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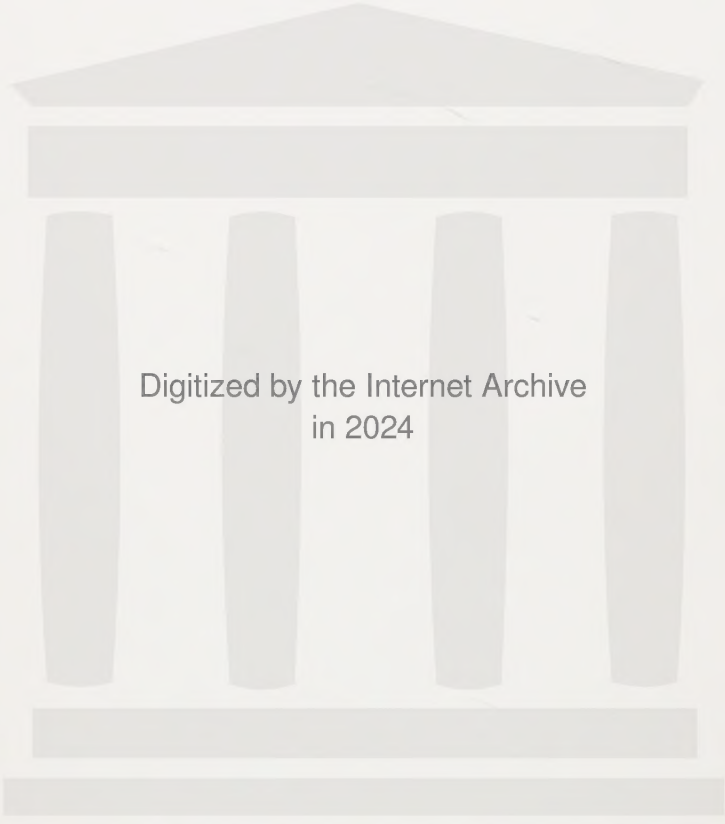
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1897.

THE

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OF THE INCORPORATED COUNCIL OF LAW REPORTING.

QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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1897.

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1897.

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1896. 1897.

Ex parte KIPPINS.

1896
Nov. 10.

Metropolis—London Hackney Carriage Act, 1853 (16 & 17 *Vict. c.* 33), *s.* 17—"*Place*"—*Railway Station—Refusal of Driver to drive Hirer into Station.*

By s. 17 of the London Hackney Carriage Act, 1853, "Every driver of a hackney carriage who shall refuse to drive such carriage to any place within the limits of this Act, not exceeding six miles, to which he shall be required to drive any person hiring or intending to hire such carriage," shall be liable to a penalty:—

Held, that the interior of a railway station, although the private property of the railway company, is a "place" within the meaning of the section.

MOTION for a rule for a mandamus to a metropolitan police magistrate to state a case.

In October, 1896, Joseph Kippins was the licensed driver of a hackney carriage, and on October 29 a lady named Kynaston engaged him at King Henry's Road, Chalk Farm, to drive her to Euston Station. Kippins drove her to the gates of Euston Station, when he was requested by her to go inside the station.

1896

Ex parte KIPPINS.

This he refused to do, although one of the company's servants was present and told him that he was at liberty to go inside the station. The lady thereupon got out of the carriage. She subsequently laid an information against Kippins under s. 17 of the London Hackney Carriage Act, 1853, for that he, being the driver of a hackney carriage, unlawfully refused to drive her, a person hiring such carriage, to a certain place within the limits of the said Act. At the hearing it was contended, for the driver, that the interior of the station, being private property, was not a "place" to which he could be required to drive within the meaning of that section. The magistrate overruled the contention and convicted Kippins of the said offence, and refused to state a case for the opinion of the High Court.

Roskill moved, on behalf of Kippins, for a rule nisi for a mandamus to the magistrate to state a case. The word "place" in s. 17 of the Act of 1853 means a place to which the public at large have a right of access. But a railway station is private property to which no member of the public has a right of access unless intending to travel by train. By s. 21 the Act of 1853 is to be construed as one with the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), and under that Act the word "place" was held, in *Skinner* v. *Usher* (1), to mean a public place over which the public have a right of way. And in *Case* v. *Storey* (2) it was expressly held that a railway station was not a "place" within the London Hackney Carriage Act, 1831 (1 & 2 Will. 4, c. 22).

GRANTHAM J. I think that there ought to be no rule. The cases cited on behalf of the applicant do not support his contention, for they were all decided on different sections of different Acts of Parliament. In *Case* v. *Storey* (2) the question was whether a hackney carriage which was inside the station of a railway company by their leave for the accommodation of their passengers was "plying for hire" in any "street or place" within the meaning of s. 35 of the London Hackney Carriage Act, 1831 (1 & 2 Will. 4, c. 22), and whether the

(1) (1872) L. R. 7 Q. B. 423. (2) (1869) L. R. 4 Ex. 319.

driver was consequently compellable under that section to go with any person desirous of hiring it. It was held that the railway station, being private property, was not a "place" within that section, as that section ought to be read along with s. 4 of that Act, which defined "hackney carriage" to be a carriage "plying for hire in any public street or road," and a station, being private property, could not be called a public street or road. In *Skinner* v. *Usher* (1) the question was whether a driver of a hackney carriage who plied for hire on an unenclosed piece of private ground over which the public had no right of way was liable to the penalty imposed by s. 33 of the London Hackney Carriages Act, 1843, on drivers "plying for hire elsewhere than at some standing or place appointed for the purpose." It was held that he was not, because, as Lord Blackburn said, the Act of 1843 was only an extension of the Act 1 & 2 Will. 4, c. 22, and must be read with it, and that "at any place" in the later Act means or is equivalent to "in any public street or road at any place," and that the plying for hire referred to in that section means a plying for hire in a public place. Again, *Clarke* v. *Stanford* (2) is against the applicant. In that case it was held that a carriage waiting in a railway station for the conveyance of passengers arriving by train "plies for hire" within the meaning of s. 4 of the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), and that it requires a licence under that Act, because as "the plying for hire" need not be in any public place, so "where a person has a carriage ready for the conveyance of passengers in a place frequented by the public he is plying for hire, although the place is private property." So here I have no doubt that a driver who refuses to drive "to any place within the limits of the Act," although it be private property, commits an offence against s. 17 of the Act of 1853, for there is no reference in the context in the Act to the word "public," or suggestion that the place to which the driver must drive is limited to a public place. The whole object of the Act would be frustrated if it was so, for in many cases within the limits of the Act the places to which the

(1) L. R. 7 Q. B. 423. (2) (1871) L. R. 6 Q. B. 357.

1896

Ex parte KIPPENS.

public wish to be driven are private, besides those places which are within the boundary of the railway companies' private property.

WRIGHT J. I am of the same opinion. There is no earlier authority binding as to cut down the language of the Act of 1853 in the way in which we are asked to do so. In my opinion the plain meaning of that language is that the driver may be required to drive to any place to which he can lawfully obtain access.

Rule refused.

Solicitors for applicant: *Pattinson & Brewer.*

J. F. C.

1896

Aug 1; *Nov.* 7.

THE QUEEN *v.* SMALLMAN.

Criminal Law — Embezzlement — Assistant Overseer — Parish Council — Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 5, *sub-ss.* 1, 2 (*c*); *s.* 81, *sub-s.* 3.

Although by s. 5, sub-s. 1, of the Local Government Act, 1894, the power of appointing and revoking the appointment of assistant overseers in rural parishes having a parish council is transferred to the parish council, an assistant overseer becomes when appointed the servant, not of the parish council, but of the inhabitants of the parish; and in an indictment for embezzling money collected by him from the ratepayers, he is correctly so described, and the money so embezzled is rightly laid as the property of the inhabitants.

CASE stated by Hawkins J. for the opinion of the Court for Crown Cases Reserved.

The prisoner was convicted upon an indictment which charged that he, on December 16, 1895, "then being in the employment as servant of the inhabitants of the parish of Upton Bishop," did receive certain money "for and in the name and on the account of the said inhabitants of the said parish of Upton Bishop his employers," and feloniously did embezzle the said money, "being the property of the said inhabitants." In December, 1893, the prisoner was duly nominated, elected, and appointed assistant overseer for the parish

of Upton Bishop under 59 Geo. 3, c. 12, s. 7. On April 16, 1895, he was also appointed to that office and to the office of clerk to the parish council by the parish council of the parish of Upton Bishop under s. 5 of the Local Government Act, 1894. Neither of the appointments above mentioned was in form revoked, and he continued to hold such offices until January 30, 1896, when he was dismissed. The money which he was charged with embezzling was money collected by him as assistant overseer. He was never appointed by the guardians of the Ross Union, within which the parish of Upton Bishop was comprised, either as collector of poor-rates or as assistant overseer of the parish under 7 & 8 Vict. c. 101, s. 62. For the prisoner it was contended that he was wrongly described in the indictment as the servant of the inhabitants of the parish.

Cranstoun, for the prisoner. The indictment was not proved, for the prisoner was the servant of the parish council and not of the inhabitants. Prior to 1894 assistant overseers were appointed, either by justices on the nomination of the inhabitants in vestry assembled under 59 Geo. 3, c. 12, s. 7, or by guardians under 7 & 8 Vict. c. 101, s. 62; in both of which cases they became upon appointment the servants of the inhabitants: *Reg.* v. *Carpenter* (1), and 12 & 13 Vict. c. 103, s. 15. But by the Local Government Act, 1894 (2), the vestry is abolished for all civil purposes. The power of appointing and revoking the appointment of an assistant overseer for every rural parish having a parish council, which was the case here, is transferred to the parish council by s. 5, sub-s. 1; and even

(1) (1866) L. R. 1 C. C. 29.

(2) By the Local Government Act, 1894, s. 5, sub-s. 1, "The power of appointing and revoking the appointment of an assistant overseer for every rural parish having a parish council shall be transferred to and vested in the parish council."

Sect. 5, sub-s. 2 (*c*): "The legal interest in all property vested either in the overseers or in the churchwardens and overseers of a rural parish, other than property connected with the affairs of the church, or held for an ecclesiastical charity, shall, if there is a parish council, vest in that council, subject to all trusts and liabilities affecting the same."

Sect. 81, sub-s. 3: "Any existing assistant overseer in a parish for which a parish council is elected shall, unless appointed by a board of guardians, become an officer of the parish council."

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in parishes which have no council the power of appointing and revoking the appointment of assistant overseers is transferred to the parish meeting: s. 19, sub-s. 5. Here, even though the prisoner's existing appointment at the date of the Act was not in form revoked, the fact that, by s. 5, sub-s. 1, the parish council had the power of revoking that appointment—a power which under s. 7 of the 59 Geo. 3, c. 12, was vested in the vestry—shews that it was intended that upon the council coming into existence the existing assistant overseer should be the servant of the council. Moreover, by s. 81, sub-s. 3, any existing assistant overseer in a parish for which a parish council is elected shall, unless appointed by a board of guardians, become an officer of the parish council. But further, the reappointment of the prisoner in April, 1895, was in substance a revocation of his previous appointment.

By s. 5, sub-s. 2 (*c*), "the legal interest in all property vested either in the overseers or in the churchwardens and overseers of a rural parish . . . . shall, if there is a parish council, vest in that council." Therefore, under that section the money collected by the prisoner vested at once in the council. If, then, he was not the servant of the council, it follows that he could not be indicted for embezzlement at all, for that offence consists in misappropriating money received on behalf of the employer.

Macmorran, Q.C., and *Gwynne James*, for the prosecution. The Act of 1894 has only altered the mode of the appointment of an assistant overseer; it leaves his duties as they were before. Upon appointment by the council, he becomes as theretofore the servant of the inhabitants. The money which he collects from the ratepayers is the money of the inhabitants, and he has to account for it to the overseers as representing the inhabitants. He does not account to the council at all. The bond given by an assistant overseer is still given to the overseers. There is nothing in the Act of 1894 requiring him to give a bond to the council. Sect. 5, sub-s. 2 (*c*), as to the vesting of property in the council, applies only to what is commonly known as parish property: it has no application to rates collected. If the money in the hands of the overseers

were vested in the council, the council might use it for purposes other than those for which it was collected: whereas they have a limited power under the Act of raising money for their expenses, and have to issue a precept in order to get it.

Cur. adv. vult.

Nov. 7. The following written judgments were delivered:—

POLLOCK B. [This judgment of the learned judge, in which Lord Russell of Killowen C.J. concurred, was read by Hawkins J.] The prisoner was tried before Hawkins J. at the last summer assizes at Hereford, and found guilty of embezzling money which he had collected as assistant overseer of the parish of Upton Bishop. In the indictment the prisoner was described as "being in the employment as servant of the inhabitants of the parish of Upton Bishop," and it was alleged that whilst he was so employed he received certain money "on the account of the said inhabitants his employers." The prisoner's counsel contended that the indictment was bad, inasmuch as the prisoner's employment was wrongly described. The material facts, as stated in the case, are as follows: The prisoner was duly nominated and appointed assistant overseer for the parish of Upton Bishop under 59 Geo. 3, c. 12, s. 7, in December, 1893. On April 16, 1895, he was also appointed to that office and to the office of clerk to the parish council by the parish council for the parish of Upton Bishop under s. 5 of the Local Government Act, 1894 (56 & 57 Vict. c. 73). Neither of the appointments above mentioned was in form revoked, and he continued to hold these offices until January 30, 1896, when he was dismissed from them. The embezzlement was committed after April, 1895, and before his dismissal. He was never appointed by the guardians of the Ross Union, within which the parish of Upton Bishop was comprised, either as collector of poor-rates or as assistant overseer of the parish under 7 & 8 Vict. c. 101, s. 62, nor could he have been so appointed after the 56 & 57 Vict. c. 73, s. 81. The 59 Geo. 3, c. 12, s. 7, provided for the election of assistant overseers by "the inhabitants of

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any parish in vestry assembled"; the same section enacted that two justices are to appoint such persons so elected. It is clear, however, that they were, when so elected and appointed, the servants of the inhabitants of the parish, although their final appointment was by the justices; and, accordingly, when it became necessary to prosecute an assistant overseer for embezzlement, he was usually described as in the present indictment. And in *Reg.* v. *Sampson* (1) it was decided by Rolfe B. that an indictment describing an assistant overseer as a clerk or servant to the overseers was bad; and in *Reg.* v. *Carpenter* (2) it was held that an assistant overseer was properly described as "a servant of the inhabitants of the parish." Thus far there seems no difficulty. But in 1894 the Local Government Act (56 & 57 Vict. c. 73) was passed, and this Act materially alters the mode of appointing assistant overseers, and uses language which creates a doubt, and has given rise to the question raised by the present case. This Act constitutes for the first time in rural parishes a "parish council," and to this council are transferred certain powers and duties which had before been discharged by the vestry. Sect. 5, sub-s. 1, is as follows: "The power and duty of appointing overseers of the poor, and the power of appointing and revoking the appointment of an assistant overseer, for every rural parish having a parish council, shall be transferred to and vested in the parish council, and that council shall in each year, at their annual meeting, appoint the overseers of the parish, and shall as soon as may be fill any casual vacancy occurring in the office of overseer of the parish, and shall in either case forthwith give written notice thereof in the prescribed form to the board of guardians."

By s. 6, "(1.) Upon the parish council of a rural parish coming into office there shall be transferred to that council—"

"(*a.*) The powers, duties, and liabilities of the vestry of the parish except (i.) So far as relates to the affairs of the church or to ecclesiastical charities; and (ii.) Any power, duty, or liability transferred by this Act from the vestry to any other authority."

(1) (1846) 1 Cox, C. C. 355. (2) L. R. 1 C. C. 29.

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By s. 81, "(1.) Where the powers and duties of any authority other than justices are transferred by this Act to any parish or district council, the officers of that authority shall become the officers of that council."

"(3.) Any existing assistant overseer in a parish for which a parish council is elected shall unless appointed by a board of guardians become an officer of the parish council."

"(4.) Every such officer, vestry clerk, and assistant overseer as above in this section mentioned shall hold his office by the same tenure and upon the same terms and conditions as heretofore, and while performing the same duties shall receive not less salary or remuneration than heretofore."

The statute under which the prisoner was indicted is the 24 & 25 Vict. c. 96, which by s. 68 provides that "whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money or valuable security which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer." This Act, it will be observed, says nothing about the appointment of the clerk or servant. The two material facts are that the prisoner should be a "clerk or servant," and that he should embezzle the money received by him "on the account of his master or employer." Now it may well be that one person or body of persons may have the appointment of a clerk or servant, and yet when he is appointed he becomes, not the servant of those who appointed him, but the servant of those whose affairs he has to manage and whose money he has to receive and pay over according to their instructions. It was upon this ground that in the cases of *Reg.* v. *Watts* (1) and *Reg.* v. *Carpenter* (2) an assistant overseer was held to be the servant, not of the magistrate who appointed him nor of the overseer, but the servant of the inhabitants of the parish whose affairs he had to manage and whose money he had to receive. Now it seems that notwithstanding the parish council under the Local

(1) (1837) 7 A. & E. 461, at p. 469. (2) L. R. 1 C. C. 29.

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Government Act, 1894, s. 5, sub-s. 1, have the power and duty of appointing and revoking the appointment of assistant overseers, their duties when appointed are the same as they were when they were elected and nominated by the vestry and appointed by justices. The rates collected, the persons from whom and the purposes for which they are collected, remain as before, and the money can in no sense be said to be the money of the parish council, nor can that council direct how it shall be dealt with. It would seem, therefore, that the prisoner was "employed" to collect the rates for the inhabitants of the parish, and that he received the money on their account and was accountable to them for it, and not to the parish council; and therefore in the indictment under consideration he was properly described as "being in the employment as servant of the inhabitants of the parish," and as having received "whilst so employed" money "on the account of the said inhabitants his employers." It may be said that this conclusion is inconsistent with the language of s. 81, sub-s. 3, which declares that an existing assistant overseer, unless appointed by a board of guardians, shall become an "officer of the parish council." In one sense, as the parish council appoint and revoke the appointment of assistant overseers, they are officers of the council; but they may not the less, in so far as the receiving and holding of money collected as rates is concerned, be the servants of and employed by the inhabitants, especially when it is clear that with respect to the discharge of their duties the council could not give any orders or directions, having no interest in their proper discharge. The object and effect of the Parish Council Act quoad the assistant overseers is to place the council in the position formerly occupied by the inhabitants of the parish or vestry assembled, whilst it leaves the duties and employment of the assistant overseer the same as they were before that Act was passed. The description in the indictment is correct, and the conviction must be affirmed.

HAWKINS J. I entirely concur in the judgment of my brother Pollock which I have just read.

There can be no doubt that the money received by an

assistant overseer in respect of the poor-rates is not the money of the parish council, and no action could be maintained by or against the parish council in respect of it. It is money which it is the duty of the assistant overseer to pay over to the overseers for distribution by them on behalf of the inhabitants of the parish for which they are appointed. For the purposes of such an indictment as this, the money is properly described as the money of such inhabitants. If the contention of the prisoner's counsel were correct, it would seem to follow that no prosecution under the statute 24 & 25 Vict. c. 96, s. 68, for embezzlement of rates by an assistant overseer appointed by a parish council, could be sustained. For that section only makes it embezzlement for a clerk or servant to embezzle money *received in the name or on account of his master or employer;* and if the parish council is to be considered as the master or employer of the assistant overseer, and the money said to be embezzled is not received in the name or on account of the council, but on account of the inhabitants of the parish, the requirements of the statute to constitute the crime of embezzlement would not be fulfilled, for the clerk or servant of the one body would have received money belonging to and on account of the other. It may be that for some purposes the assistant overseer may be the servant of the parish council; but for the purposes of collecting the poor-rates he is the servant of the inhabitants whose money he collects.

GRANTHAM J. In my judgment the conviction must be affirmed.

The only doubt that has arisen in this case has been caused by the appointment of assistant overseer being now transferred by the Local Government Act, 1894, from the vestry of the parish and the local justices of the peace to the parish council. It is alleged that in consequence of that transfer the assistant overseer ceases to be the servant of the inhabitants of the parish and becomes the servant of the parish council. To make the contention logical it must be also contended that the money in the hand of the assistant overseer is the money of the parish council and not the money of the inhabitants of the

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parish: but an examination of the Local Government Act, 1894, will shew, I think, conclusively that neither contention is valid. To determine the question properly it is necessary to see what were and are the duties of the assistant overseer, by whom he was appointed, and what is now the position of the parish council in reference to him and to the parish it represents. The office of assistant overseer is comparatively a modern appointment, for though overseers were appointed by the Statute of Elizabeth, which is the foundation of our poor law system, yet assistant overseers were not appointed till the 59 Geo. 3, c. 12. His duties were practically the same as those of overseers had been—namely, to assess the poor-rate on the inhabitants of the parish, to collect the money from them, and then to pay it over to the persons authorized to receive it (now the guardians of the union in which the parish is situated), the chief difference between the position of the overseers and the assistant overseers being this, that the first were not paid for their services, whereas the assistant overseer was paid a salary, which salary was included in the amount required to be raised, and he became, therefore, a servant to those who were his employers, and the money in his hands was the money also of his employers, i.e., those on whose behalf he had collected it. On whose behalf was it, then, collected? Not of the overseers to whom he was assistant, but of the persons to whom it still belonged after collection, and whose liability to pay that particular amount so collected did not cease until it was paid over by him on their behalf—namely, on behalf of the inhabitants of the parish. That being his position and those being his duties, let us now see how he was appointed. He was appointed, or rather nominated, by the vestry of the parish, the vestry being the only corporate representation of a parish at that time, and he was then on that nomination appointed by the justices of the peace for the division in which the parish was situated. But that system of appointment did not make him the servant of the overseers any more than the servant of the justices, and the cases of *Reg.* v. *Sampson* (1) and *Reg.* v.

(1) 1 Cox, C. C. 355.

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Carpenter (1) are distinct authorities for saying that the assistant overseer was not the servant of the overseers, but was the servant of the inhabitants of the parish on whose behalf he received the money of the ratepayers or inhabitants of the parish. That being, I think, a correct description of his duties and the way in which he was appointed, let us next turn to the position of the parish council and see whether the Local Government Act, 1894, has in any way altered the position of the assistant overseer to the inhabitants of the parish, though it may have altered the machinery by which he is elected to or confirmed in his post. By that Act the power of the vestry to nominate or select him, and the power of the justices to appoint him, is taken away, and in lieu of that method of dual appointment the appointment is to be at once made by the county council. But that seems to me to be the beginning and end of the change in his position to the inhabitants of the parish. If he ceased to be their servant in collecting their money it would be because he was collecting their money for some one else—namely, the parish council; but the parish council have no interest in or control over the money he collects. He makes no return to them, he gives no account to them, and they cannot control one single penny that he so collects; and although he often, nay generally, is the clerk to the parish council, because it is convenient and economical that he should be, yet he need not be so appointed; but if he is appointed, the duties and position of clerk are quite independent of his position as assistant overseer, and the salary for such duties is independent of and in excess of what he gets as assistant overseer. It must not be forgotten that the parish council has practically no power over the finance of the parish, and has to apply to the clerk of the guardians or rural district council for a grant to enable them to pay the expenses incurred by it. It may be that, as s. 81, sub-s. 3, of the Local Government Act, 1894, says he shall (except as therein mentioned) become an officer of the parish council, he might be correctly so described in the indictment; but on that I give no opinion as it is not before us, and it does not in any way affect the question we have to determine

(1) L. R. 1 C. C. 29.

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—namely, whether he is still the servant of the inhabitants of the parish.

For these reasons I think the conviction is good.

LAWRANCE J. concurred.

Conviction affirmed.

Solicitors for prosecution: *Prior, Church & Adams, for Burt, Ross.*

Solicitor for prisoner: *Braund, for Hebb, Ross.*

J. F. C.

C. A.

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Oct. 30.

[IN THE COURT OF APPEAL.]

In re FLOWERS & CO.

Bankruptcy—Service of Notice—Partnership—Action for Dissolution—Service on Receiver appointed by the Court—Bankruptcy Rules, 1890, *r.* 260.

Service of a bankruptcy notice on a receiver and manager, appointed by the Court in an action for the winding up of a partnership business, is not service on a person having the control or management of the partnership business within rule 260 of the Bankruptcy Rules, 1890.

APPEAL from an order of a registrar in bankruptcy dismissing a petition for a receiving order presented against the debtors.

The debtors were a firm consisting of five members, some of whom, being desirous of dissolving partnership, commenced an action in the Chancery Division, and in that action a receiver and manager was appointed. The members of the firm thereupon ceased to attend at the place of business, and the business was carried on by the manager. The petitioning creditors, who had previously brought an action against the firm, obtained judgment and issued a bankruptcy notice, which was served on four out of the five partners. The fifth partner could not be found; and the notice was thereupon served on the receiver and manager at the place of business. On objection that no proper service of the notice had been effected, the registrar dismissed the petition.

The petitioning creditors appealed.

F. Cooper Willis, for the petitioning creditors. Service on the receiver was a good service under rule 260 of the Bankruptcy Rules, 1890, as he was a person having the control or management of the partnership business. (1) When he was appointed, the partners had no further right to interfere in the business, and personal service on them all became in this case impossible. That is a result which would frequently happen if words are to be read into the rule to exclude a receiver appointed by the Court; even though, as in this case, he is appointed at the request of all the partners.

Muir Mackenzie, for the debtors. A receiver appointed by the Court, whether by consent or otherwise, is the officer of the Court, and responsible to the Court only. He is not affected by a receiving order against the partners: *In re Jameson, Ex parte Cresswell* (2); and, not standing in the relation of servant to the partners, a notice served on him cannot affect them.

F. Cooper Willis, in reply.

LORD ESHER M.R. I am of opinion that this appeal should be dismissed, and I come to that conclusion upon what I consider to be the true construction of rule 260. As to the position of the receiver appointed by the Court, he is the officer and servant of the Court, and not of the partners. As I pointed out in the case of *Burt, Boulton & Hayward* v. *Bull* (3), only the Court can dismiss him, or give him directions as to the mode of carrying on the business, or interfere with him if he is not carrying on the business properly, and he is in no sense the servant of the partnership. On the true construction of rule 260, I think there is a necessary implication that the person described in the rule as having the control or management of the business must be a person having authority

(1) Rule 260 of the Bankruptcy Rules, 1890, directs that "any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm in England, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there."

(2) (1891) 8 Mor. 278.

(3) [1895] 1 Q. B. 276.

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from the partners, and acting as their agent, and that consequently the rule does not apply to a receiver and manager appointed by the Court, and deriving his authority from that appointment, and not from the partners. The service was, therefore, ineffectual, and the registrar was right in dismissing the petition.

Lopes L.J. I am of the same opinion. The material words of rule 260 of the Bankruptcy Rules, 1890, are "any person having at the time of service the control or management of the partnership business there." I agree with the Master of the Rolls that these words imply a person having the control or management of the business for and on account of the partners, and indicate some one in the position of an agent or servant. Having regard to the fact that the person served in this case did not stand in any such relationship to the partners, but was a receiver appointed by and responsible to the Court, I think the decision of the registrar was right.

Rigby L.J. A receiver and manager appointed by the Court is certainly not the agent of the parties; but admitting that to the fullest extent, I do not know that, if I had to decide this case sitting alone, I should have arrived at the same conclusion as the other members of the Court, from which, however, I do not dissent.

Appeal dismissed.

Solicitors for petitioning creditors: *Kingsbury & Turner.*
Solicitor for debtor: *George Coote.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1896
Nov. 18.

WILMOT *v.* ALTON AND ANOTHER.

Bankruptcy—Contract for Supply of Chattels on Hire—Equitable Assignment of Future Payments—Validity of Assignment as against Trustee in Bankruptcy.

A trader, who carried on the business of a theatrical costumier, contracted with a company to supply dresses for a ballet and keep them in repair for the sum of 40*l.* a week for twelve weeks commencing from a certain date. She subsequently charged her right and interest under the contract in favour of the plaintiff as security for an advance made by him. The dresses were duly supplied to the company under the contract, but before any moneys became payable under it the trader became bankrupt:—

Held, affirming the judgment of the Lord Chief Justice, that the charge in favour of the plaintiff gave no title as against the defendants, the trustees in bankruptcy, to moneys which might become due under the contract after the bankruptcy.

APPEAL from judgment of the Lord Chief Justice at the trial of an interpleader issue before him without a jury. (1)

Previously to June 10, 1895, one Ellen Ruthven, a theatrical costumier (trading as Mrs. May), entered into a contract with the Blackpool Winter Gardens and Pavilion Company for the supply of dresses and wigs for a ballet. The terms of the contract were admitted to be correctly stated in a letter dated June 10, 1895, addressed to Mrs. May by the manager of the company, and which was as follows: "I beg to acknowledge receipt of your contract to supply designs for the forthcoming ballet, viz., 'Eldorado, The Land of Gold,' and 'Sons of the Sea,' according to sketch. The terms to be 40*l.* per week for 12 weeks, commencing July 8, 1895, and wigs as may be required for the sum of 3*l.* per week for the same period. You to find all materials and to keep in repair during the run." The dresses were duly supplied by Mrs. May under the contract.

On July 4, 1895, by an indenture made between Mrs. May, therein called the mortgagor, and Charles Wilmot, therein called the mortgagee, reciting the above contract, and reciting

(1) [1896] 2 Q. B. 254.

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that the mortgagee had at the request of the mortgagor, and for her accommodation, accepted certain bills of exchange drawn by her to the amount of 330*l.*, it was witnessed that the mortgagor "doth hereby charge to and in favour of the mortgagee all that her beneficial right, title, and interest in the said recited agreement . . . . for securing to the mortgagee the said sum of 330*l.* . . . . And the mortgagor doth hereby constitute, nominate, and appoint the mortgagee as her lawful attorney for her and in her name to sue and take such legal or other steps as may be necessary to enforce the rights of her the mortgagor under the said recited agreement as if she were personally doing the same."

On July 13 a receiving order was made against Mrs. May on her own petition, and on July 23 notice of the receiving order was given by the official receiver to the Blackpool company. On July 26 Mrs. May was adjudicated bankrupt. On August 6 notice of the indenture of July 4 was for the first time given to the Blackpool company. On October 1, a sum of 318*l.* 18*s.* having become due and payable by the Blackpool company under their contract in respect of the hire of the dresses, Charles Wilmot, claiming to be entitled thereto under the assignment to him of July 4, brought an action against the company to recover that sum. The trustees in Mrs. May's bankruptcy having also claimed the money, the company paid the money into court, and an interpleader issue was directed in which the claimant Wilmot was plaintiff and the trustees were defendants. There was no evidence that any repairs to the dresses became necessary during the run of the ballet, but, if any such repairs were in fact done, there was no evidence who did them. The Lord Chief Justice gave judgment for the defendants.

Cooper Willis, Q.C., and *Hawtin*, for the plaintiff. Though no debt had become due to the bankrupt under her agreement with the company, she had contractual rights under it which she could assign to the plaintiff, and such assignment is valid as against the trustees in bankruptcy. These dresses were bailed to the company until the period for which they were hired should have expired. Till then the company had a

special property in them, and the trustees in bankruptcy could not interfere with them. Upon the expiration of that period certain sums would become due under the agreement. The case of *Ex parte Nichols, In re Jones* (1), upon which the Lord Chief Justice relied, is not analogous to the present. There the trustee might have determined the business out of which the earnings arose. He elected to carry on the business, and the subsequent profits, of course, belonged to him. Here the trustees in bankruptcy could not have determined the bailment, and cannot be said to have earned the sum which subsequently became payable under the contract with the company. It does not appear that any repairs were necessary or were done after the bailment of the dresses took place.

[They cited *In re Davis & Co., Ex parte Rawlings* (2); *In re Isaacson, Ex parte Mason.* (3)]

H. Reed, Q.C., and *Scarlett*, for the defendants. The onus of proving his own title lay on the plaintiff, and, if anything turned on it, he ought to have proved that no repairs were required or were done to the dresses after the bankruptcy. It is submitted that the meaning of the contract with the company was not that particular dresses were to be bailed to the company to be left with them until after the expiration of the specified period, but that the bankrupt should provide designs and dresses according to the designs for the piece and keep them in repair until that period had expired. It is a fallacy to treat this merely as a contract of bailment. The moneys payable under it would never be earned unless the bargain to supply materials and keep the dresses in repair were carried out till the end of the period. It was part of the bankrupt's business as a costumier to continue the supply of dresses till the end of the period. The general property in them passed to the trustees on the bankruptcy, and the moneys which ultimately became payable in respect of the continued supply of the dresses must be treated as having been earned by them by carrying on the business for the benefit of the estate.

Cooper Willis, Q.C., in reply.

(1) (1883) 22 Ch. D. 782. (2) (1888) 22 Q. B. D. 193.
(3) [1895] 1 Q. B. 333.

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LORD ESHER M.R. In this case a contract was made by the bankrupt, who carried on the business of a theatrical costumier, with a company that she would supply designs for costumes for a ballet, and make them up, and supply them to the company, and that, after they had been supplied, she would keep up the supply for twelve weeks in consideration of the sum of 40*l.* per week. She was also to find wigs as required for the sum of 3*l.* per week for the same period, and she was to repair the dresses and wigs as might be necessary during the whole of the time. If she had not become bankrupt, her right to payment under the contract would have depended upon her being able to shew that she had done her part under it, that is to say, had supplied the dresses and wigs as required and done the repairs, or had been ready and willing to do them, if any had become necessary, during the period covered by the contract. If she had performed these conditions, she would be entitled to the payment of the moneys payable under the contract week by week or in a lump sum at the end of the period. In my opinion the true construction of the contract is that she would be entitled to be paid at the end of each week, if during the week she had done all that was required, or had been ready and willing to do all that might have been required under the contract. Therefore, to entitle her to payment of the moneys payable under the contract, she had to perform onerous conditions during the whole of the period mentioned. During the period contemplated by the contract she became bankrupt. The effect of that was that she could no longer fulfil the contract. The trustee in bankruptcy in such a case may, if he thinks it for the benefit of the estate, carry on the business and the contract; but he is not obliged to do so. He would have a right to say that he would not have anything to do with the contract. If the trustee in this case had done so, no moneys not already accrued due under the contract could after that become payable to any one under it. After the bankruptcy therefore no money would have become payable under the contract, unless the trustee had elected to go on with it, and to perform the conditions which by the terms of it were to be performed by the bankrupt. If he did go on with the contract,

then in consideration of his doing so week by week the sums of money payable under the contract would become due. Therefore the case stands thus. At the moment of the bankruptcy, there is, as regards sums to become payable in futuro under the contract, no debt due. There are amounts which may or may not become due according as the conditions of the contract are or are not fulfilled. In order to earn those amounts, the conditions of the contract must be fulfilled, and their fulfilment depends upon the question whether the trustee in bankruptcy will go on with the contract or not. Under these circumstances, what is the effect of the bankruptcy law and the decisions on the subject which have been cited to us? It seems to me that the Lord Chief Justice was right in holding that there was no debt due from the company in this case at the time of the bankruptcy, but only an obligation to pay certain moneys if certain conditions were fulfilled, and, when those conditions were performed, it was not by the bankrupt but by the trustee in bankruptcy for the benefit of the estate; and therefore according to the bankruptcy law the moneys when they became due belonged to the estate. The case of *Ex parte Nichols, In re Jones* (1), seems to me to shew that the right to payments under a contract which are not debts at the date of the bankruptcy, but will only become due in future if certain conditions are fulfilled, is not a right which can be transferred so as to deprive the trustee in bankruptcy of his claim under the contract. For these reasons I think the appeal should be dismissed.

LOPES L.J. I am of the same opinion. If the amount in question had been a debt which had accrued due at the date of the bankruptcy, the case would have been different. But that was not so. In order to determine the nature of the right which was assigned to the plaintiff, it is necessary to consider the terms of the contract. Having regard to those terms, it appears to me clear that there was only a debt which might or might not become due to the assignor in futuro according as the conditions of the contract were or were not fulfilled. That

(1) 22 Ch. D. 782.

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being so, the case appears to me to come directly within the decision in *Ex parte Nichols, In re Jones.* (1) The distinction taken by Fry L.J. in *In re Davis & Co., Ex parte Rawlings* (2), between that case and *Ex parte Nichols, In re Jones* (1), is worthy of observation as throwing light on the question raised in the present case. The learned Lord Justice there says in giving judgment: "Then it is said that the payments which became due from the hirers under the hiring agreements after the bankruptcy were not capable of being validly assigned as against the trustee on the authority of *Ex parte Nichols.* (1) But that case has no bearing on the present, for that which was assigned in the present case was a debt due at the date of the assignment, though it was not payable until a future time. In *Ex parte Nichols* (1) nothing was due to the bankrupts at the date of the assignment, but they attempted to assign a debt which might become due to the trustee in their bankruptcy at a future time. They had nothing to assign." It appears to me that that observation is applicable to the present case. There is this further consideration. Assuming that these dresses were in existence and had been supplied to the company at the date of the bankruptcy, the general property in them would pass to the trustees subject to the special property in the hirers. The moneys, therefore, which afterwards became due for their hire, became due after they had ceased to be the bankrupt's, and when the general property in them was vested in the trustees. This consideration seems to me strong to shew that the judgment of the Lord Chief Justice was correct.

RIGBY L.J. I agree. I rest my judgment exclusively on the reasons given by the Lord Chief Justice. Though the circumstances of this case are very different from those which existed in *Ex parte Nichols, In re Jones* (1), I think that the principle which is applicable to the two cases is the same. Where a person who has entered into contracts in the course of his business ceases to carry on business on account of bankruptcy, there is an important distinction, for the present

(1) 22 Ch. D. 782. (2) 22 Q. B. D. 193.

purpose, between cases in which, the consideration for the contract having been wholly executed by the bankrupt on his part, a sum of money becomes due to him under the contract, and cases of executory contracts in which the money will not be earned under the contract unless the person contracting continues to carry on business and fully performs his part of the contract which has only been partially performed at the date of the bankruptcy. In the latter class of cases the bankrupt cannot create greater rights in favour of an assignee from him than he has himself; it rests with the trustee to say whether the business is to be carried on and the contract performed or not, and, if he elects to perform it, he has a right to the consideration for such performance when it becomes due. That is the fair principle which appears to me applicable to the present case. Here the bankrupt carried on a business part of which consisted of designing and supplying costumes for theatrical purposes and keeping the costumes so supplied in repair. In the course of that business she made an agreement with a company for the supply and repair of costumes for a ballet for a certain time which had not expired at the date of the bankruptcy. The conditions of the contract could not be fulfilled unless the business was carried on, and, if they had not been fulfilled, no money would have become payable under the contract. In such a case it may be that the trustee in bankruptcy would get the contract carried out by the bankrupt; but the bankrupt would be carrying it out on behalf of the trustee, and not on her own account. If he carries out the contract, he is entitled to the money which was the consideration for the performance of the contract when it becomes due. The assignee of the bankrupt cannot have any greater right to that money than the bankrupt in the absence of an assignment would have had. With regard to the suggestion that no repairs to the dresses were shewn to have been required or done after they were originally supplied, it does not appear to me material to inquire what as a matter of fact took place, though it would seem to be next to impossible that no repairs were required during a twelve weeks' run. The nature of the obligation imposed by the contract

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appears to me to be the material consideration, not the way in which the circumstances require it to be carried out. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *H. Reid.*

Solicitor for defendants: *J. C. Button.*

E. L.

C. A. 1896 *Nov.* 18.

[IN THE COURT OF APPEAL.]

SIMS *v.* TROLLOPE & SONS.

Bill of Sale—Form in Schedule—Attesting Witness, Description of—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

The meaning of the term "description" in the form in the schedule to the Bills of Sale Act, 1882, which requires the description of the witness attesting a bill of sale to be given, is not confined to the description of his occupation.

Where the attestation clause of a bill of sale contained no description of an attesting witness who had no occupation:—

Held, that the bill of sale was void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882.

APPEAL from the judgment of Grantham J. upon the trial of an interpleader issue before him without a jury.

The plaintiff, as grantee of a bill of sale, claimed goods taken in execution as against the defendants, the execution creditors. In the attestation clause of the bill of sale, which was given by way of security for payment of money by the grantor, the name and address of the attesting witness appeared, his address being 5, Victoria Street, Westminster; but no description of him was given. It appeared from the evidence that he had no occupation or business, but lived at the address mentioned on an allowance made him by his father. The learned judge was of opinion that the witness might have been properly described in the bill of sale as a gentleman, and that, no description of him being given, the bill of sale was void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882. He therefore gave judgment for the defendants.

Jelf, Q.C., and *Clavell Salter*, for the plaintiff. The description contemplated by the form in the schedule to the Bills of Sale Act, 1882, is a description by reference to the witness's occupation. By s. 10 of the Bills of Sale Act, 1878, the affidavit to be filed on the registration of the bill of sale is, among other things, to give a description of the residence and occupation of every attesting witness to the bill of sale. The two Acts are to be read as one. It is contended that the true construction is that the description contemplated by the form in the schedule is the same as that which is to be verified by the affidavit. It cannot have been the intention of the Act that a description of the occupation should be given where none existed: see *Ex parte Young, In re Symonds*. (1) If no interest were to be paid, it could not be that a bill of sale would be void, because it did not state the rate of interest as directed by the form. The omission of any description is equivalent to a statement that the witness was of no occupation. *Parsons* v. *Brand* (2) and *Coulson* v. *Dickson* (3) are not in point, for in those cases it appeared that the attesting witness had an occupation.

[They also cited *Lamb* v. *Bruce*. (4)]

Marchant, for the defendants. The question here is whether the bill of sale is in accordance with the form in the schedule, which expressly provides that a description shall be given. The question in *Ex parte Young, In re Symonds* (1), was as to the effect where the affidavit filed on registration did not contain a description of the witness's occupation as required by the Act of 1854. The word "description" in the form contained in the schedule to the Bills of Sale Act, 1882, cannot be read as meaning only "description of occupation."

Extraneous evidence cannot be admissible on the question whether the bill of sale is in accordance with the form. That question must be determined by comparison of the bill of sale with the form. [He cited *Bird* v. *Davey*. (5)]

Jelf, Q.C., in reply.

(1) (1880) 42 L. T. 744; 28 W. R. 924.
(2) (1890) 25 Q. B. D. 110.
(3) (1890) 25 Q. B. D. 110.
(4) (1876) 45 L. J. (Q.B.) 538.
(5) [1891] 1 Q. B. 29.

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LORD ESHER M.R. The question is whether this bill of sale is made in accordance with the form in the schedule to the Bills of Sale Act, 1882. I will not say what view I might have taken in this case in the absence of the previous decisions of this Court by which it has been held that a literal compliance with the exact form given in the schedule is necessary. That form provides that the witness's name, address, and "description" shall be given. Former Acts dealing with the same subject-matter spoke of the "description of the occupation" of the witness. In such a case the canon of construction is that, unless strong reason to the contrary exists, such an alteration of language on the part of the Legislature must be taken to have been intentional. That being so, I do not think that we can hold that the term "description" as used in the form is synonymous with the term "description of occupation," though it would no doubt include a description with reference to occupation. I cannot doubt that, if the witness had an occupation, it would be sufficient to describe it. Unless the word "description" in the schedule is read as equivalent to description of occupation, the case of *Ex parte Young, In re Symonds* (1), is no authority in favour of the validity of this bill of sale where no description is given. If "description" in this Act could be read as meaning only description of occupation, I should perhaps agree with the view taken in that case to the effect that, where a man had no occupation, the Act could not be construed as meaning that a description should be given of that which did not exist. To take the illustration suggested with regard to interest, it would take a good deal to persuade me that a bill of sale must specify the amount of interest, if no interest were to be paid. No question of that sort arises here; for, as I have said, I do not think the term "description" in this Act means only description of occupation. It includes something more than that. It is not necessary for the present purpose to define exhaustively what that something is; but I think it would include a witness's "addition" in the legal sense of that word. If that be so, has it been shewn that in the present case the witness had no such addition? I do not think so. It appears to me

(1) 42 L. T. 744; 28 W. R. 924.

that everybody, or almost everybody, must have such an addition. Under these circumstances, the case seems to me to come exactly within the former decisions of this Court to which we have been referred. It was held in those cases that the bill of sale must give such a description as it can give. In this case the description is totally omitted. For these reasons I think the appeal must be dismissed.

Lopes L.J. I agree. The Bills of Sale Act, 1882, s. 8, provides that every bill of sale shall be duly attested; and s. 9 provides that a bill of sale given as security for payment of money shall be void unless made in accordance with the form in the schedule. That form expressly directs that the name, address, and description of the attesting witness shall be given. In this case the name and address of the witness are given, but the description is left blank. The question is whether under these circumstances the bill of sale is made in accordance with the form. It is not a question how far a description which has been given is accurate or not. The contention for the plaintiff must be that, although the form expressly directs that the description shall be given, and although there is a total omission to give any description, nevertheless the bill of sale is made in accordance with the form. It is not necessary for the purposes of this case to give a precise definition of the meaning of the word "description" as used in the Act; but in my opinion it includes a description of the profession, trade, or occupation of the witness, or, if he has no profession, trade, or occupation, his style. In this case, the description being totally omitted, I think the bill of sale cannot be said to be in accordance with the form in the schedule. I do not mean to say that I should not have been of the same opinion if the matter were res integra; but it is not. It seems to me that this point is really covered by the decisions in *Parsons* v. *Brand* (1) and *Coulson* v. *Dickson* (2), especially the latter case, in which the facts were almost identical with those of the present case. Cotton L.J. in giving judgment said: "I do not look upon the divergence in the present case as a mere immaterial one. The

(1) 25 Q. B. D. 110. (2) 25 Q. B. D. 110.

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Act of 1878 required that every bill of sale should be attested by a solicitor. The Act of 1882 repealed that enactment; and, when that requirement was done away with, it became a matter of substance that the attesting witness should be so described on the face of the document as to shew what sort of person he was." Those observations are applicable to the present case.

RIGBY L.J. In the present case we are asked to say that, although the form directs that the description of the attesting witness shall be given, and no description within any meaning of the word is given in the present case, nevertheless the bill of sale is good. What I might have thought, if the matter were res integra, I will not say. That is not the position of affairs. This Court has held in the two cases that have been cited, of which *Coulson* v. *Dickson* (1) is most nearly similar to the present, that, where no description is given of the attesting witness, the bill of sale is not in accordance with the form, and therefore void. It was sought to distinguish those cases by saying that there the witness obviously had a description by reference to his occupation. But that was not the ground of the decision. It was there argued that, as the affidavit filed on the registration of the bill of sale gave a description, it supplied all that was wanted, and therefore the policy of the Act was complied with. That argument was overruled; and the Court, treating the description of the attesting witness as an essential part of the form, held that the omission to give any description was fatal. I cannot distinguish those cases from the present. I think that to distinguish them as suggested would be frittering away the decision of this Court.

Appeal dismissed.

Solicitor for plaintiff: *Alfred Slater.*

Solicitors for defendants: *Trollope & Winckworth.*

(1) 25 Q. B. D. 110.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1896
Nov. 17.

BENSAUDE & CO. *v.* THE THAMES AND MERSEY MARINE INSURANCE COMPANY.

Insurance (Marine)—Loss of Freight—Exception—"Claim consequent on loss of Time"—Loss of Time arising from Peril of the Sea.

A time policy of insurance upon freight contained a clause, "warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." After the commencement of a voyage the main shaft of the steamer was broken from a peril of the sea, and she returned to her port of loading. Repairing the ship necessitated a delay which frustrated the object of the venture; and the charterers, as they were entitled to do by the law of Portugal, which was applicable, cancelled the charter, and the freight was lost. In an action on the policy for a total loss of freight:—

Held, that the claim was consequent on loss of time within the meaning of the exception, and that the underwriters were not liable.

APPEAL from the judgment of Collins J. in favour of the plaintiffs at the trial of the action without a jury.

The plaintiffs were the owners of the steamship *Peninsular*, and the defendants were underwriters. The plaintiffs insured the freight, valued at 2500*l*., in the *Peninsular* from February 11, 1895, for twelve months with the defendants for the sum of 1500*l*. The policy covered total or constructive total loss and general average only. The following provision was printed on a separate slip of paper and pasted (with others) on the policy: "Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise."

On April 5, 1895, the *Peninsular* was chartered by a syndicate called the Empreya Naçional to carry Portuguese troops and stores from Lisbon to Lourenço Marques in South Africa at an agreed freight. On April 15 the *Peninsular* sailed from Lisbon with the troops and stores, but on the following day her main shaft broke from an admitted peril of the sea. She had to put back to Lisbon; and on her arrival there it was discovered that she would have to go to Cadiz to be repaired, and that the delay would be such as to make it impossible that she should

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convey the troops and stores to Lourenço Marques in the requisite time. The troops and stores were consequently landed, and proceeded to Lourenço Marques in another vessel, and the Empreya Naçional declined to pay the plaintiffs any freight. The *Peninsular* was repaired in about a fortnight, and was able then to earn freight on another voyage.

The plaintiffs brought this action against the defendants on the policy, but on argument claimed for loss of freight on cargo only, and not for loss of passage-money. It was admitted that the rights of the parties must be governed by Portuguese law, and evidence was called to shew that by the law of Portugal, where goods which have been shipped on board a vessel cannot without material damage be delayed until the vessel is in a condition to proceed on her voyage, the charterparty may be cancelled, even although the voyage has commenced; and that where the cargo is brought back to the port of loading in consequence of an accident to the vessel, no freight is payable. This evidence was not contradicted.

The learned judge decided that the claim of the plaintiffs could not be described as a claim "consequent on loss of time," but was a claim consequent on the disabling of the vessel by a peril of the sea, and arose at once before any loss of time had taken place, and gave judgment for the plaintiffs.

The defendants appealed.

Joseph Walton, *Q.C.*, and *Scrutton*, for the defendants. The freight was lost by reason of loss of time, for the damage could be repaired, but the time required for repairs defeated the object of the venture. The exception, therefore, applies to this case, and relieves the defendants from liability.

[They cited *Tully* v. *Howling* (1), *Jackson* v. *Union Marine Insurance Co., Ld.* (2), *Jamieson and Newcastle Steamship Freight Insurance Association* (3), and *The Bedouin*. (4)]

Leck (*Bigham*, *Q.C.*, and *Bucknill*, *Q.C.*, with him), for the plaintiffs. The real cause of the loss of freight was the breaking of the shaft through a peril insured against, and there has

(1) (1877) 2 Q. B. D. 182.
(2) (1874) L. R. 10 C. P. 125.
(3) [1895] 2 Q. B. 90.
(4) [1894] P. 1.

been a total loss of freight as in *Jackson* v. *Union Marine Insurance Co., Ld.* (1) The exception deals with a loss consequent on loss of time only, and does not apply. It is for the underwriters to shew that they have excluded their liability by apt words, and that they have failed to do.

Joseph Walton, Q.C., in reply.

LORD ESHER M.R. I think that this appeal ought to be allowed. The case depends on the construction to be placed on a warranty in a policy against total loss of freight. The policy as applied to the circumstances of this case is against total loss of the chartered freight for the carriage of a cargo from Lisbon to Lourenço Marques, which is payable after delivery of the cargo. Some freight would be payable if any part of the cargo were delivered; but if none is delivered, no freight would be payable. Very shortly after the commencement of the voyage the main shaft of the vessel broke, and that was caused by perils of the sea. At that stage there could not be said to be a total loss, for the delay caused might be slight, and no loss of freight might arise. What, then, caused a total loss in this case by perils of the sea? That loss was caused by the fact that the breaking of the shaft would delay the ship so long as to render the adventure which the charterparty was intended to cover absolutely nugatory. The cause of the total loss was, therefore, the breaking of the shaft by reason of perils of the sea followed by the consequent loss of time. Is it possible to say that the claim for a total loss was not consequent on loss of time? It is true it did not arise wholly out of loss of time; but if there is a claim arising from perils of the sea, but also consequent on loss of time which arises from the injuries caused by the perils of the sea, in my opinion it comes within the terms of this warranty. I cannot, therefore, agree with the judgment of the learned judge; and the appeal must be allowed and judgment entered for the defendants.

LOPES L.J. I am of the same opinion. The plaintiffs established in this case, in my judgment, a total loss of freight

(1) L. R. 10 C. P. 125.

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Lopes L.J.

by perils of the sea, for which the defendants were bound to pay them the amount secured by the policy unless they are protected by the exception which has created the difficulty in this case. Now, in my opinion, the object of the voyage was frustrated by the combined effect of the breaking of the shaft, which was a peril of the sea, and the loss of time consequent thereon. That being so, does this exception apply—"Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise"? I am compelled to differ from the learned judge, and in my opinion that exception does apply. I have great difficulty myself in being able to conceive any case to which it would apply unless it applies to the circumstances of this case. I think, therefore, that the appeal must be allowed.

RIGBY L.J. I am of the same opinion. From the first I thought that the case fell within the terms of the exception; and I have listened for any reason why, that being the case, the exception should not be treated as operative. I fail to find any such reason either in the judgment of the learned judge or in the arguments addressed to us here; and, under those circumstances, I am of opinion that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1896
Nov. 5.

THE DIDCOT, NEWBURY AND SOUTHAMPTON RAILWAY COMPANY *v.* THE GREAT WESTERN RAILWAY COMPANY AND THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Railway—Regulation—Railway and Canal Commissioners—Jurisdiction—Through Booking—Reasonable Facilities—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 25.

An application for through booking over a route passing along several lines of railway is not a matter of right, but the granting of it is governed by the considerations that affect an application for a through rate under s. 25 of the Railway and Canal Traffic Act, 1888.

Appeal from a judgment of the Railway and Canal Commissioners' Court.

Application was made by the Didcot, Newbury and Southampton Railway Company for through rates for traffic to be forwarded viâ their railway between the London and South Western stations at Southampton and Southampton Docks and the Great Western stations at Reading, Windsor, and Paddington, and for through booking for passengers. The applicants' railway extends from Didcot, through Newbury and Winchester to Shawford, and forms a junction with the Great Western at Didcot and at Newbury, and with the South Western at Shawford. The application was opposed by the London and South Western Railway Company, and the Court differed in opinion. Sir F. Peel was of opinion that the application should be granted both as to through rates and through booking: as to the latter, on the ground that there was sufficient evidence that it would be a reasonable facility that passengers between Southampton and Paddington or Reading should be able to book through. Lord Cobham was of opinion that a case had not been made out as to through rates; but that as regards passengers, as only through booking was asked for, and as that

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could be claimed as of right under an amended petition, he would not differ as to the making the order asked for. Collins J. expressed his agreement with the judgment of Sir F. Peel, and added that he regarded the decisions in that Court as binding on him. The learned judge continued: "It is, further, clear law that through booking as distinguished from through rates is, for all practical purposes, a matter of right. It is pointed out by Mr. Commissioner Miller in *Great Western Ry. Co.* v. *Severn and Wye Ry. Co.* (1) that through booking between certain points being practically a matter of right as a reasonable facility, it is only when you come to deal with the question of rate, and thereby force a company to take something less than it is by law entitled to demand, that the considerations which are introduced under the 25th section of the Act of 1888, namely, the advantage to the public and the reasonableness of the route, come into question. . . . . No point was made before us, either by the Great Western Company or by the South Western Company, against the quantum of the rate. The Great Western Railway accepted it subject to the question of apportionment. The South Western Company, in its defence, it is true, suggested that it did not accept it, but no word of argument was addressed to us, from beginning to end, pointing to the rate, as distinct from the route, being unreasonable. This practically, in my judgment, brings the case to something very little more than an application for through booking, and a very slight primâ facie case of advantage to the public, I think, would suffice on the authorities, as they exist in this Court, to entitle the applicants to the order which they ask for."

The result of the judgments was that the application was granted.

The London and South Western Railway Company appealed against so much of the order as had reference to through booking by passengers.

Cripps, Q.C., and *Moon*, for the London and South Western Railway Company. The learned judge appears to have based

(1) (1887) 5 R. & C. Traf. Ca. 170.

his decision in favour of the applicants on the proposition of law laid down by Mr. Commissioner Miller in *Great Western Ry. Co.* v. *Severn and Wye Ry. Co.* (1), that the allowance of through booking as distinguished from a through rate is a matter of right. That view cannot be supported; for through booking is not only not a matter of right, but it cannot be ordered unless there is a through rate pursuant to s. 25 of the Act of 1888. The matter has never been decided in the High Court; but a series of cases are opposed to the view taken and acted on in the Commissioners' Court.

[They cited *Zunz* v. *South Eastern Ry. Co.* (2); *South Eastern Ry. Co.* v. *Railway Commissioners* (3); *Great Western Ry. Co.* v. *Railway Commissioners* (4); *Bristol and Exeter Ry. Co.* v. *Collins.* (5)]

Page appeared for the Great Western Railway Company.

Littler, Q.C., and *Acworth* (*Balfour Brown, Q.C.*, with them), for the Didcot, Newbury and Southampton Railway Company. It is not now contended that through booking is a matter of right; but it is a reasonable facility, and may be granted under s. 2 of the Act of 1854. Without it, transit over several lines would be impossible, as fresh booking would have to take place at each change to a fresh line. This appeal, however, is concluded by the agreement of Collins J. with Sir F. Peel that on the facts of the case through booking was a reasonable facility which should be granted.

[They cited *In re Barret* (6) and *Sussex County Council* v. *London, Brighton and South Coast Ry. Co.* (7)]

Cripps, Q.C., in reply. If the learned judge found on the facts that through booking was a reasonable facility, this appeal fails; but the argument is that where no public interest is involved, and it is merely a question of the shareholders of one company against the shareholders of another, through booking cannot be asked for as a matter of right, as it throws on the company against which it is granted a common law liability on

(1) 5 R. & C. Traf. Ca. 170.
(2) (1869) L. R. 4 Q. B. 539.
(3) (1881) 6 Q. B. D. 586.
(4) (1881) 7 Q. B. D. 182.
(5) (1859) 7 H. L. 194.
(6) (1857) 1 C. B. (N.S.) 423.
(7) (1892) 8 R. & C. Traf. Ca. 17.

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the contract it is compelled to make, in respect not only of its own line, but of the whole of the route.

LORD ESHER M.R. What happened in the Commissioners' Court was that there was an application with regard to goods and passengers to have it declared that there was a duty on the part of the South Western Railway Company to book goods and passengers through from Southampton to Paddington on the Great Western line, and also that there should be a through rate for the goods. The commissioners inquired into the whole matter. Sir F. Peel dealt with the question on the footing of whether it would be for the advantage of the public that there should be through booking across the line of the applicants and on to Paddington by the Great Western. He considered the point, and came to the conclusion that it would be advantageous to have a through booking and a through rate from Southampton along the South Western line, the applicants' line, and that of the Great Western. If the commissioners had jurisdiction it would not matter under which Act they had it. The question, then, is whether they had jurisdiction to deal with the matter before them by considering amongst other things if it would be of advantage to the public. Sir F. Peel did that. In my opinion, he had jurisdiction as to goods under the Act of 1854 and the Act of 1888, and as to passengers under the Act of 1888, s. 25.

Collins J. went through the same process with regard to those questions as Sir F. Peel, and came to the same conclusion; but Lord Cobham differed on the facts. There were thus two judgments to one, and, the Court having jurisdiction, we cannot interfere with their conclusion. But the learned judge, finding that the other two commissioners disagreed as to the facts, thought it would be well to support the decision of the majority by an argument that did not depend on the facts. The matter of law that he decided was that in considering the question of through booking the commissioners are not bound by the consideration of public convenience or the other limitations and considerations which are contained in s. 25 of the Act. He thought that it was right for the legal member of the Court to

follow the decisions on points of law of former legal members, so long as they were not overruled by a superior Court. Accordingly, he followed the decision of Mr. Commissioner Miller in *Great Western Ry. Co.* v. *Severn and Wye Ry. Co.* (1) as he understood, and as I understand, the holding in that case. That decision was that as a matter of law the question of through booking may be considered and determined without the limitations and conditions applicable to through rates, and that therefore as a matter of law through booking should be allowed. In this Court that proposition of law is open to review, and, in my opinion, it is wrong; but as the learned judge was in agreement with Sir F. Peel on the facts, that puts an end to the appeal, and the judgment must be supported. He has, however, asked for our opinion on the point of law; and I think under the circumstances we should give it. What I consider as to through booking is this: There may be an application to the commissioners for a through rate, but such an application would not be made unless the rate asked for is one that is less in amount than the aggregate of the rates over the different parts of the route. The commissioners may grant a through rate, but in doing so they must take into consideration public convenience and other matters. If a through rate is granted, it seems to me to follow as a matter of necessity that there must be a through booking. The converse of this seems to me to be equally true, and if a through booking is asked for it must be taken into consideration that if it is granted it follows as a matter of necessity that there must be a grant of a rate corresponding to the booking. If the commissioners think that it is for the advantage of the public that there should be a through booking, and if they do not interfere with the rate, it will, by the granting of the booking, be a rate payable for the through journey, which is, in ordinary language, a through rate. It will be one rate made up of the amounts of the rates over the different portions of the route. If they consider that there should be less paid than the aggregate of the rates, then they will grant a reduced rate; but in either case there is one rate. I think that, subject to the consideration of

(1) 5 R. & C. Traf. Ca. 170.

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the conditions and limitations imposed by the statute, the result may be arrived at either by the grant by the commissioners of a through booking or of a through rate.

LOPES L.J. It was not necessary for the learned judge to decide the matter of law, because it is now clear that on the facts he came to the same conclusion as Sir F. Peel. As, however, he went on to deal with the law and desires some statement by this Court on the point, I propose to say a few words on it.

In my opinion through booking is a reasonable facility, and it cannot be granted as a matter of right, or unless evidence is given which brings it within the purview of the statutes. I am not clear that the learned judge adopted the view of Mr. Commissioner Miller, which, I think, was clearly that through booking is a matter of right. I rather gather that what the learned judge meant was, that provided a certain amount of evidence is given in support of through booking and that evidence is not rebutted, the Court is justified in coming to the conclusion that it is a reasonable facility and should be granted.

I cannot myself think that through booking may not be granted without a through rate. In the case of passengers I can imagine cases of extreme inconvenience arising on a journey over two or more lines if a fresh ticket has to be taken at each change. If the companies did not act harmoniously to prevent such inconvenience, it would be right to apply to the commissioners to order through booking. I think, therefore, there may be through booking without a through rate. Of course, the aggregate of the local fares would, if there had been no reduction, be paid to the first company whose line was travelled over and paid in one sum; but I do not understand that that is what is generally called a through rate. I cannot understand traders or other persons asking for a rate of that kind. If they have obtained through booking, it follows, as a matter of course, that the rate which they have to pay would be the aggregate of those of the lines over which the passenger has to pass, and the object of an application for a through rate is to reduce the amount of that aggregate. However that may be,

I am clearly of opinion that through booking may be granted by itself without a through rate as a reasonable facility, as described by Wills J. in *Sussex County Council* v. *London, Brighton and South Coast Railway Co.* (1)

The result of this appeal is that the decision of the majority of the commissioners must stand as they agreed on the facts, and so the question of law was not material.

RIGBY L.J. Agreeing as I do with the judgment of the Master of the Rolls, I will only add a few words as to the matter of law that has been raised. With regard to that question, I am unable to see how there can be through booking without a through rate, or how a rate can be granted as a through rate without facilities being granted for through booking. I have not heard anything to convince me that the expression "through rate" applies only to a rate less than the aggregate of the local rates over the route. A man pays for his journey one sum, and knows nothing of the distribution of that sum among the different companies: he only knows that he has paid one sum that he or his goods may be carried over the whole distance. He has paid for through carriage, and I should suppose that he and every one concerned would consider that as a through rate, whether it is the amount of the local rates or something less. It seems to me to follow that through booking would only be granted for the same considerations that would govern the grant of a through rate.

I agree that the decision of the majority of the commissioners on the facts must stand.

Appeal dismissed.

Solicitors for applicants: *Lake & Lake.*

Solicitors for London and South Western Railway Company: *Bircham & Co.*

Solicitor for Great Western Railway Company: *R. R. Nelson.*

(1) 8 R. & C. Traf. Ca. 17.

A. M.

C. A.
1896
Nov. 14.

[IN THE COURT OF APPEAL.]

VESTRY OF ST. MARTIN-IN-THE-FIELDS *v.* WARD.

Metropolis—New Sewer substituted for old—Connecting Drain—Expenses—Metropolis Management Act (18 & 19 *Vict. c.* 120), *ss.* 69, 73.

Where, in consequence of the provision by a vestry under the Metropolis Management Act, 1855, s. 69, of a new sewer in substitution for an old one into which a house was previously drained, it became necessary to make a new drain connecting the house with the new sewer:—

Held, that s. 73 of the Act did not apply, and the vestry could not under that section recover the expense of making the new drain from the owner of the house.

Appeal from judgment of Wills J. at the trial without a jury.

The action was brought to recover the expenses incurred by the plaintiffs in constructing a drain for the purpose of draining a house belonging to the defendant, and connecting the same with a sewer of the plaintiffs.

The defendant was the owner of the house in question, which was situated in Buckingham Street, within the plaintiffs' district. His house and others in the street had formerly been drained into a sewer passing under land in the rear of them. The plaintiffs instructed their surveyor to report upon the drainage of the houses and premises situated in an area forming part of their district which included Buckingham Street, and to prepare a scheme for proper drainage of that area. The surveyor made a report in pursuance of these instructions by which he recommended extensive alterations in the system of sewerage in the area in question. Among other things, he condemned the sewer into which the defendant's house was drained, as being improperly constructed and in an insanitary condition, and recommended the construction of a new sewer under the roadway in front of the houses in Buckingham Street into which they were to be drained. The plaintiffs adopted his report and scheme, and in pursuance thereof proceeded to construct a new sewer as recommended by him. They sub-

sequently served on the defendant a notice purporting to be given under s. 73 of the Metropolis Management Act, 1855, by which they required him to make a drain connecting his house with the new sewer. Upon his refusing to do so, they did the work themselves. Evidence was given to the effect that the drain connecting the defendant's house with the old sewer was improperly constructed, and the learned judge found that it was insufficient, but he was of opinion that the liability to construct the drain connecting the defendant's house with the new sewer lay upon the plaintiffs under s. 69 of the Metropolis Management Act, 1855, and therefore gave judgment for the defendant. (1)

(1) The point was raised that the proper remedy for the recovery of expenses such as those in question was not by action; but it will be seen that in the result it became unnecessary to deal with that point.

The Metropolis Management Act, 1855, s. 69, provides (inter alia) that "it shall be lawful for any such vestry or district board from time to time to enlarge, contract, raise, lower, arch over, or otherwise improve or alter all or any of the sewers, watercourses, and works which shall be from time to time vested in them or subject to their order and control, and to discontinue, close up, or destroy such of them as they may deem to have become unnecessary: provided always that no new sewer shall be made without the previous approval of the Metropolitan Board of Works: provided also that the discontinuance, closing up, destruction, or alteration of any sewer as aforesaid shall be so done as not to create a nuisance: and, if by reason thereof any person shall be deprived of the lawful use of any covered sewer, it shall be the duty of the vestry or district board to provide some other sewer or a drain as effectual for his use as the sewer of which he is so deprived: provided also that, where the vestry or district board alter any sewer, or provide a new sewer in substitution for a sewer discontinued, closed up, or destroyed, they may contract or otherwise alter the private drains communicating with the sewer so altered, or with the sewer so discontinued, closed up, or destroyed, or may close up or destroy such private drains, and provide new drains in lieu thereof, as the circumstances of the sewerage may appear to them to require, but so that in every case the altered or substituted drain shall be as effectual for the use of the person entitled thereto as the drain previously used."

Sect. 73: "If any house or building, whether built before or after the commencement of this Act, situate within any such parish or district, be found not to be drained by a sufficient drain communicating with some sewer, and emptying itself into the same, to the satisfaction of the vestry or board of such parish or district, and if a sewer of sufficient size be within one hundred feet of any part of such house or building, on a lower level than such house or building, it shall be lawful for the vestry or board, at their discretion, by notice in writing, to require the owner of such house or

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Macmorran, Q.C., and *Beven*, for the plaintiffs. The provisions of s. 73 of the Metropolis Management Act, 1855, are applicable to the present case, and not those of s. 69. The provisions at the end of s. 69 only apply where an existing sewer is discontinued, closed up, or destroyed. In this case the vestry had not actually discontinued the old sewer. If the defendant's drain had been sufficient, he would not have come within s. 73, and the vestry could not have thrown upon him the expense of making a drain communicating with the new sewer; but, his premises having no sufficient drain communicating with a sewer, he comes within the very words of s. 73, and can be required to construct a sufficient drain communicating with any sewer within a hundred feet of his house at a lower level. If there had been only the old and defective sewer, he could have been required to construct a sufficient drain communicating with that. He is in default. Why should he be relieved of his obligation because the vestry has provided a new and better sewer?

[They cited *Vestry of St. Marylebone* v. *Viret.* (1)]

Channell, Q.C., and *R. C. Glen*, for the defendant, were not called upon.

LORD ESHER M.R. In this case the vestry have made a new sewer in a position where no sewer before existed, and, contrary to the will of the defendant, have made a new drain from his house to that sewer, a drain which in direction, fall, and all other respects is altogether different from that which

building forthwith, or within such reasonable time as may be appointed by the vestry or board, to construct and make from such house or building into any such sewer a covered drain, and such branches thereto, of such materials, of such size, at such level, and with such fall as shall be adequate for the drainage of such house or building . . . . and, if the owner of such house or building neglect or refuse, during twenty-eight days after the said notice has been delivered to such owner, or left at such house or building to begin to construct such drain and other works aforesaid, or any of them, or thereafter fail to carry them on and complete them with all reasonable despatch, it shall be lawful for the vestry or board to cause the same to be constructed and made, and to recover the expenses to be incurred thereby from such owner in the manner hereinafter provided."

(1) (1865) 34 L. J. (M.C.) 214; 19 C. B. (N.S.) 424.

before existed. The question is whether, having made this new drain, they can compel the defendant to pay for it. That question turns upon two sections of the Metropolis Management Act, 1855, which appear to deal respectively with two different states of circumstances. Sect. 73 deals with a case in which there is a sewer vested in the vestry or district board, and a house within a certain distance from that sewer is not connected with it by a sufficient drain. In that case the vestry or board may require the owner of the house to make a sufficient drain communicating with the sewer; and, if he should not do so, they may do the work themselves and recover the expense from him. By s. 69 a wholly different power is given to them. Under that section they may consider the existing system of sewerage in their district, and, if they come to the conclusion that an existing sewer is objectionable, and that the district would be better drained by a new sewer, they may construct such a sewer, and may cause the premises which previously were drained into the old sewer to be drained into the new one which they have constructed. In that case they must bear the expense of so doing themselves. There may be a question which of these powers they have exercised; they may exercise the power given by s. 73 of requiring the owner of premises to make a sufficient drain communicating with an existing sewer; or they may exercise the power of establishing a new system of sewerage given by s. 69. If they exercise one of these powers, they can compel the owner of the premises to pay the expense of making the drain; if they exercise the other, they must bear the expense themselves. The principle of law upon this subject is laid down by Willes J. in the case of *Vestry of St. Marylebone* v. *Viret* (1), where he said that, assuming the vestry to have found the drain to be insufficient, yet it must be ascertained whether the proceedings were under s. 73 or s. 69, and the question was whether the work was rendered necessary because the private drain required improvement, in which case the private owner must bear the expense, or because of the alteration of the sewers, in which case the public must. I will take it that in the present case the

(1) 34 L. J. (M.C.) 214; 19 C. B. (N.S.) 424.

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drain connecting the defendant's premises with the old sewer was insufficient. That gave the plaintiffs the power of proceeding under s. 73. But did they act under that section? The answer must, as it appears to me, be in the negative. What they did was to consider what would be for the benefit of the district. They did not consider that it would be sufficient to require the defendant to make a new drain into the existing sewer. What they did was to disregard the old system of drainage altogether, and to say that a new sewer must be laid down, and all the houses in the street must drain into that sewer. It was not a question of making the old drain draining into the existing sewer sufficient. The effect of this resolution was that the old sewer was condemned, and was to be no longer used, or, in other words, that it should be discontinued, and a new sewer should be made with new drains into it. It seems to me that what they did under that resolution must be taken to have been done entirely under the provisions of s. 69, and therefore they must bear the expense of doing it themselves. I think that the judgment must be affirmed.

LOPES L.J. I am of the same opinion. The question is whether the facts of this case bring it within s. 69 or within s. 73. The conclusion at which I arrive is that it is brought within the former section, because I think that the alteration of the defendant's drain was really rendered necessary by the substitution of the new sewer for the old one. It may be that the defendant's drain was defective. The judge has so found, and I will assume that to have been the case; but the true reason for the construction of the new drain was the insufficient character of the old sewer, which was to be discontinued, not physically, but in the sense that by virtue of the resolution of the vestry the use of it was to be discontinued. If the case is brought within s. 69, the result appears to me to be that these expenses cannot be thrown upon the defendant. To put the matter shortly, I think that this work was done for the improvement of the general system of drainage in the district, and therefore the expense must be borne by the public.

RIGBY L.J. I am of the same opinion. The argument of the counsel for the plaintiffs was that this case came within s. 73, and not within s. 69. If he could have established that, he would have succeeded. I will assume that but for the existence of s. 69 the case would have come within the terms of s. 73; but the question seems to me really to be whether it comes within s. 69, for if it does the plaintiffs must bear the expenses incurred themselves and cannot throw them upon the defendant. It appears to me that the argument for the plaintiffs rested on too literal an interpretation of the words of s. 69. As I understood the argument, it was that, because, when the vestry endeavoured to put in force the powers given by s. 73, the old sewer was not in fact discontinued, they were entitled to exercise those powers. I cannot think that that contention is consistent with the meaning of the legislation. Under s. 69 the vestry have power to consider whether the system of sewerage in their district is sufficient and in proper condition, whereas under s. 73 they have to consider whether there is a sufficient drain to particular premises. In this case the vestry came to the conclusion that the system of sewerage in the district was in many respects insufficient, and in consequence they made a new sewer in substitution for an old one, which they would have had no power to do unless they were exercising the powers of s. 69. It was for the purposes of that new sewer that it became necessary to construct a new drain. The counsel for the plaintiffs endeavoured to combine the powers given by the two sections in this way. He contended that the vestry could proceed to a certain extent under s. 69, and then might stay their hands and say that, because they had not yet discontinued the old sewer, they were entitled under s. 73 to deal with the particular circumstances of the defendant's house, as not being sufficiently drained into any sewer, and throw upon the defendant the expense of making a drain into the new sewer. I do not think that s. 73 applies to cases where the necessity for the new drain has been created by reason of the construction of a new sewer for the purposes of s. 69. The two sections appear to me to deal with different subject-matters, and the vestry cannot avail themselves of the powers of s. 69 in

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order to give themselves jurisdiction to proceed under s. 73. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Fladgate & Co.*
Solicitors for defendant: *Angell, Imbert Terry & Page*

E. L.

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Nov. 6.

THE QUEEN *v.* MAYOR, &c., OF HASTINGS.

Local Government—Sewers—Single Drain draining several Houses—Liability to Repair—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 41—*Hastings Improvement Act*, 1885 (48 & 49 *Vict. c. cxcvi.*), *s.* 148.

Sect. 41 of the Public Health Act, 1875, empowers a local authority, on written application made to them stating that a drain is a nuisance or injurious to health, to enter the premises, and if the drain appears to be in bad condition, or to require alteration or amendment, to give notice to the owner or occupier to do the necessary works.

Sect. 148 of the Hastings Improvement Act, 1885, in cases where two or more houses are connected with a single private drain, which conveys their drainage into a public sewer, gives the corporation all the powers conferred by s. 41 of the Act of 1875.

The owner of several houses connected with a single drain conveying their drainage into a public sewer applied for a mandamus to the corporation to repair and maintain the drain. No application had been made under s. 41 of the Public Health Act, 1875:—

Held, that the Hastings Improvement Act, 1885, did not empower the corporation to require the owner to repair and maintain the drain, and the corporation were liable to repair and maintain it.

AN order nisi had been granted for a mandamus to the corporation of the borough of Hastings, directing them to repair and maintain a drain at the back of twenty-nine houses in Athelstan Road, Clive Vale, Hastings. The houses in question were built in or about the year 1880 by a builder named Rogers. Plans were submitted to the corporation, who were the local authority, shewing a proposed drain, into which each of the houses was to drain, at the back of the row of houses, running at one end into the common sewer in the street. The corporation approved the plans with the exception that they directed that each house should have a separate communication

with the sewer in front. The houses, however, were completed with the drain as shewn on the plans, and were passed as fit for habitation. Mr. Young, the prosecutor, afterwards became owner of the houses as mortgagee in possession. The water in the wells belonging to the houses having become contaminated by leakage from the drain at the back, the corporation complained of the state of the drain, alleging that the owner was bound to repair it. Thereupon the order nisi for a mandamus was obtained.

Bosanquet, Q.C. (*A. H. Trevor* with him), for the corporation of Hastings, shewed cause. The decisions relating to this question are somewhat conflicting, but the balance of authority is in favour of the contention of the corporation, which is, that the effect of s. 148 of the Hastings Improvement Act, 1885 (1), is to shift the liability to repair and maintain the drain in question, and entitle the corporation to call upon the owner of the houses to do the necessary works, in accordance with s. 41 of the Public Health Act, 1875. (2) The Act of 1875 applies

(1) By the Hastings Improvement Act, 1885 (48 & 49 Vict. c. cxcvi.), s. 4, "'Public Health Acts' means the Public Health Act, 1875, and any Acts amending the same. . . . The several words and expressions to which meanings are assigned . . . . in the Public Health Acts, ... or which have therein special meanings, have in this Act (except where otherwise expressly provided) the same respective meanings, unless there be something in the subject or context repugnant to such construction."

By s. 5, "This Act shall be carried into execution by the corporation . . . . according to . . . . the Public Health Acts . . . . with all the rights, powers, privileges, and authorities, and subject to all the obligations, and liabilities, conferred or imposed by those Acts . . . . on the corporation . . . . with respect to matters provided for by or comprised in . . . . the Public Health Acts."

By s. 148, "In cases where two or more houses are connected with a single private drain which conveys their drainage into a public sewer, the corporation shall have all the powers conferred by s. 41 of the Public Health Act, 1875." Similar provisions are contained in s. 19 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59).

(2) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, "'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons

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equally to previously existing drains and to drains made after the date of the Act. [He referred to *Self* v. *Hove Commissioners* (1); *Hill* v. *Hair* (2); *Bradford* v. *Mayor, &c., of Eastbourne*. (3)]

Macmorran, Q.C., and *S. G. Lushington*, for the prosecution, were not called upon.

GRANTHAM J. In my opinion it is clear that the mandamus which is asked for ought to go. The decision of Lord Russell C.J. and Wills J. in *Bradford* v. *Mayor, &c., of Eastbourne* (3), which has been relied upon on behalf of the corporation, has no application to the case now before the Court. In the present case the mortgagee in possession, who is in the position of owner, of twenty-nine houses in Athelstan Road, Clive Vale, Hastings, applied to the corporation, who are the local authority, to repair the drain which conveys the sewage of his houses into the public sewer. The corporation, on the other hand, contend that they are entitled to apply the provisions of s. 41 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), by which they may empower their surveyor or

is conveyed: 'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies. . . ."

By s. 13, "All existing and future sewers within the district of a local authority, together with all buildings, works, materials and things belonging thereto" (with certain exceptions not material here) "shall vest in and be under the control of such local authority."

By s. 15, "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

By s. 41, "On the written application of any person to a local authority stating that any drain . . . . on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise), the local authority may, by writing, empower their surveyor or inspector of nuisances . . . . to enter such premises . . . . and cause the ground to be opened, and examine such drain. . . . If the drain . . . . on examination appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him . . . . to do the necessary works"; the section imposes penalties for non-compliance with such notice, and empowers the local authority to do the works and recover the expenses.

(1) [1895] 1 Q. B. 685.
(2) [1895] 1 Q. B. 906.
(3) [1896] 2 Q. B. 205.

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inspector of nuisances to enter the premises and examine the drain, and if it appear to be in bad condition, or to require alteration or amendment, may require the owner or occupier to do the necessary works. It is clear to my mind that s. 41 does not apply to a case where no application has been made to the local authority, stating that the drain is a nuisance or injurious to health. It follows therefore that the corporation are bound to repair and maintain this drain, and the order nisi for a mandamus must be made absolute.

WRIGHT J. I doubt whether such a case as this ought to have been brought before the Court on an application for a mandamus, there being another remedy available (1). Speaking for myself, I should say that the proper course would be to apply to the Local Government Board to make an order under s. 299 of the Public Health Act, 1875, for the performance of their duty by the corporation. Coming to the case itself, we find that a general liability to repair and maintain sewers is imposed by the Public Health Act, 1875. If it had been intended by s. 19 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), or by s. 148 of the local Act which has been referred to in the present case, to repeal the existing liability, the Acts would have been differently drawn, and would have contained some express provision, the effect of which would have been to alter the Act of 1875. As the Acts stand, they leave the general liability untouched. Sect. 19 of the Act of 1890, and s. 148 of the Hastings Improvement Act, give power to make an application under s. 41 of the Act of 1875 in certain cases, and entitle the local authority to recover the expenses incurred by them. Sect. 41 of the Public Health Act, 1875, entitles the local authority, on application made to them, to enter the premises and have the necessary works done: but that right arises only where a written application is made, stating that the drain is a nuisance or injurious to health, which has not been done in the present case. It is quite just that if the owner of property allows it to get into such a state as to be

(1) See *Reg.* v. *Registrar of Joint Stock Companies*, (1888) 21 Q. B. D. 131; *Reg.* v. *Lambourn Valley Ry. Co.*, (1888) 22 Q. B. D. 463.

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a nuisance or injurious to health, he should have to pay the cost of the necessary repairs. In *Bradford* v. *Mayor, &c., of Eastbourne* (1), Lord Russell C.J. and Wills J. were dealing simply with s. 41 of the Public Health Act, 1875, and s. 19 of the Public Health Acts Amendment Act, 1890, and they did not say that the later Act took away the general liability imposed by the Act of 1875. In *Self* v. *Hove Commissioners* (2) the Court had no intention of deciding that such liability was taken away. In *Hill* v. *Hair* (3) the Court distinctly held that the liability existed.

Order absolute.

Solicitor for the prosecution: *Charles H. W. Osborn, for Young, Son & Coles, Hastings.*

Solicitors for the corporation of Hastings: *Lydall & Sons, for B. F. Meadows, Town Clerk of Hastings.*

P. B. H.

C. A.

1896

Nov. 6

[IN THE COURT OF APPEAL.]

In re BETTS.
Ex parte BETTS.

Bankruptcy—Receiving Order—Absence of Assets.

Where a debtor, against whom a bankruptcy petition was presented, had not obtained his discharge in a previous bankruptcy, and the Court were convinced from all the circumstances of the case that there were no assets which would be available under a second bankruptcy, and that the only result of making a receiving order would be a waste of money in costs:—

Held that, the Court having a discretion in the matter, a receiving order ought not under the special circumstances of the case to be made.

APPEAL against a receiving order made by a registrar in bankruptcy.

The act of bankruptcy upon which the order was made was non-compliance with the requirements of a bankruptcy notice founded upon a judgment recovered by the petitioning creditor against the debtor in May, 1893.

(1) [1896] 2 Q. B. 205. (2) [1895] 1 Q. B. 685.
(3) [1895] 1 Q. B. 906.

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It appeared that there had been a previous adjudication of bankruptcy against the debtor in 1892, under which the petitioning creditor had proved in respect of a prior debt. Only a small amount had been paid by way of dividend in that bankruptcy, and the debtor had not received his discharge. The debtor had previously to the prior bankruptcy been entitled to the income of certain trust funds under a settlement made by his father upon him; but by the terms of the settlement that interest determined upon bankruptcy, and upon its so determining the trustees had a discretionary power of making him an allowance. The debtor had made an affidavit to the effect that he had no other assets.

S. G. Lushington, for the debtor. The petition in this case cannot be presented bonâ fide with the object of distributing the debtor's assets among the creditors. The debtor is an undischarged bankrupt, and any property which belonged to him or which may devolve upon him is vested or will vest in the trustee under the former bankruptcy. See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44. Only a small dividend was paid in that bankruptcy, and the petitioning creditor must have known that there are no assets, for he was a creditor under it. In a case in which the Court could see that there were not and could not be any assets and the petition was not presented bonâ fide with the object of administering the debtor's estate, it was held that the Court had a discretion to refuse to make a receiving order: *In re Otway*. (1) This case is distinguishable from *In re Leonard*. (2) In that case the Court had not before the receiving order was made the proper materials for judging whether there were assets or not. In this case the Court can see clearly that there cannot be any assets. [He also cited *Ex parte Robinson*. (3)]

Muir Mackenzie, for the petitioning creditor. The Court cannot know at the present stage of the proceedings that there will not be assets available for distribution among the creditors under the second bankruptcy. If there were a surplus under

(1) [1895] 1 Q. B. 812. (2) [1896] 1 Q. B. 473.
(3) (1883) 22 Ch. D. 816.

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the first bankruptcy, the trustee would have to hand it over to the trustee under the second bankruptcy. There may have been a voluntary settlement or other transaction by the debtor upon the avoidance of which assets might arise. The case of *In re Leonard* (1) decides that the fact that there are apparently no assets is no ground for refusing to make a receiving order, because before it is made the Court has no proper materials for judging whether there are assets or not, and the Court ought to make the order so that there may be a public examination of the debtor, by which it may be ascertained whether there are assets. [He also cited *In re Hecquard.* (2)]

Lushington, in reply.

LORD ESHER M.R. In this case I think the law on the subject is clear. It is proposed to make the debtor a bankrupt, and he has made an affidavit in which in effect he says that it is no use making him a bankrupt, because he has no assets which could be dealt with in the bankruptcy and no prospect of ever having any. If that were all, I should repeat what I have said in former cases—namely, that the Court is not at this stage of the proceedings in a position to know whether that statement of the debtor is true, and cannot accept it as a sufficient ground for not making a receiving order. But I think that the law may properly be stated thus. If the Court is clearly convinced, not merely by the statement of the debtor, but from all the circumstances of the case, that there cannot be any assets or any prospect of any coming into existence, and that, if a receiving order is made, the only effect will be a mere waste of money in costs, then in such a case the Court has a discretion in the matter, and will be justified in exercising that discretion by refusing to make the order. The question, therefore, is whether the circumstances afford sufficient grounds for thinking that the present is such a case. In this case the debtor was made a bankrupt some years ago. At that time the income of certain trust funds was settled upon him on the terms that, if he became bankrupt, his right to that income ceased at once. It is true that the trustees of the settlement

(1) [1896] 1 Q. B. 473. (2) (1889) 24 Q. B. D. 71.

had a discretion to make him an allowance; but that is not an asset, for they may at any time withdraw the allowance. Therefore that asset is wholly gone. Then is there any other asset? The former bankruptcy is still standing, and the petitioning creditor was a creditor under it. If he thought there were any assets, he could put the trustee under that bankruptcy in motion to obtain the benefit of them. He takes no steps for that purpose. That being so, why does he propose to make the debtor a bankrupt a second time? I do not wish to fathom his motives, but it seems clear to me that he must know that there are no assets, and no probability of any becoming available. It is said that there is a possibility of assets. But I think that a Court of justice ought not to take into consideration a possibility of which there is no probability. There does not appear to me to be in this case any possibility of assets in a business sense. There being no probability or even possibility in a business sense of the existence of assets which would pay off the debts under the first bankruptcy, and so become available for the purposes of the second, it appears to me that the result of making a receiving order would only be to cause a waste of money in costs which would be incurred uselessly. Therefore, under the special circumstances of this particular case, I think the Court in the exercise of its discretion ought to refuse to make a receiving order. For these reasons I think the appeal must be allowed.

LOPES L.J. I am of the same opinion. I entirely agree with the law laid down by the Master of the Rolls, to the effect that, where from all the circumstances of the case it is perfectly clear that there is no asset and no reasonable probability of any asset coming into existence in the future, and that the only effect of making a receiving order would be a useless heaping up of costs, the right course is to refuse to make an order. I do not think that this view is in conflict with any of the cases already decided. Then we have to see whether the circumstances of the present case bring it within the law as I have stated it. It appears to me that they do. I agree with the Master of the Rolls that, if there were only the affidavit of the

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debtor, that would not be sufficient to shew that there were no assets. In this case there is a great deal more than that, because the debtor has been made bankrupt on a previous occasion, and at the present moment has not obtained his discharge in that bankruptcy. Any assets the debtor might have would go to the trustee under that bankruptcy. The petitioning creditor was a creditor under it, and I cannot help thinking that, if there were anything available as assets, he would have endeavoured to get it made available under the prior bankruptcy. It looks under the circumstances very much as if the object of the present proceedings was to extort money from the debtor's relatives. Taking into consideration the special circumstances of this case, which can hardly, I think, be a precedent for any other except one where the same circumstances exist, I think the Court ought not in the exercise of its discretion to make an order, the only effect of which would be a wanton waste of money in costs which would be thrown away.

RIGBY L.J. I agree with the Master of the Rolls and my brother Lopes that the Court has a discretion in the matter, though no doubt we are bound by the principles laid down by previous cases in this Court as to the exercise of that discretion. As a general rule no doubt the Court cannot give effect to mere statements to the effect that there are no assets made on the part of the debtor; but in the case of *In re Hecquard* (1), where that general rule was laid down, it appears to me to have been recognised that, though that is the general rule, the Court has a discretion. The question is whether upon the facts of this particular case this discretion is to be exercised in one way or the other; and I go so far as to say that it cannot form a precedent for any other case unless the circumstances are exactly similar. We have to consider whether it is made reasonably clear in this case that the effect of a receiving order would only be to pile up costs for nothing. The former bankruptcy swept away the income to which the debtor was entitled under the settlement, and the debtor remains undischarged

(1) 24 Q. B. D. 71.

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under that bankruptcy. The petitioning creditor as a creditor in that bankruptcy must have known that there were no further assets available under it. Only a small dividend was paid, and apparently there is no prospect of obtaining anything more. Having regard to all the circumstances of the case I see no reason for dissenting from the conclusion at which the other members of the Court have arrived, namely, that we ought to exercise our discretion by refusing to make a receiving order.

Appeal allowed.

Solicitors for petitioning creditor: *Hicks, Arnold & Mozley.*
Solicitor for debtor: *J. Laidman.*

E. L.

MINNA CRAIG STEAMSHIP COMPANY AND JAMES LAING *v.* CHARTERED MERCANTILE BANK OF INDIA LONDON AND CHINA.

Oct. 29. Nov. 10.

Company—Liquidation—Property situate Abroad—Proceedings in Foreign Court—Judgment in Rem—Right to retain Proceeds against Liquidator.

Whilst a ship, owned by the plaintiffs, an English joint stock company, was loading in India for a voyage to a German port, her master was induced by fraud to sign bills of lading for goods which were never put on board. The bills of lading were indorsed for value without notice of the fraud to the defendants, a banking company whose registered place of business was in England. By the law of Germany non-delivery of the goods specified in a bill of lading entitles the holder of the bill to a lien upon the vessel. The ship sailed, and whilst she was at sea a petition was presented for the winding-up of the plaintiff company, and on the day on which the ship arrived in the German port a winding-up order was made. On the same day the defendants, who had in the meantime discovered the fraud, arrested the ship and took proceedings against her in the German Court to enforce their lien. The German Court ordered the ship to be sold, declared the defendants to be entitled to the lien claimed, and ordered that lien to be satisfied out of the proceeds of the sale. The plaintiffs, who were not parties to the proceedings in the German Court, then brought an action in England against the defendants to recover from them the fruits of their foreign judgment as money had and received to the plaintiffs' use, alleging it to be divisible among the general body of the creditors:—

Held that, the judgment of the German Court being a judgment in rem,

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the money received by the defendants under it was not subject to any trust in favour of the general body of the plaintiffs' creditors, and that the plaintiffs could not recover.

TRIAL before Collins J. without a jury.

The plaintiff company, being a company incorporated under the Joint Stock Companies Acts, was in 1892 the owner of the steamship *Minna Craig*. The plaintiff James Laing was mortgagee of the ship under a statutory deed of mortgage registered on August 21, 1891; and in June, 1892, there was owing to him under the said mortgage the sum of 31,000*l*. In June, 1892, the *Minna Craig* was at Bombay loading cargo for a voyage to Hamburg, when by means of forged receipts purporting to be signed by the mate for goods shipped on board her the master was induced to sign bills of lading for goods which were never in fact put on board. At various dates between June 16 and June 24, the defendants, whose registered place of business is in London, in the course of their business purchased the said false bills of lading for value without notice of the fraud. On June 23 the ship sailed for Hamburg, and while she was at sea in the beginning of July the fraud was discovered by the defendants. On July 20, 1892, a petition was filed for the winding-up of the plaintiff company, which petition was duly advertised in the *Gazette* on July 26, and on August 11, 1892, a winding-up order was made. On the same day, August 11, 1892, the *Minna Craig* arrived at Hamburg, when the defendants' agents, Messrs. Berenberg, Gossler & Co., took proceedings on the defendants' behalf in the German Court at Hamburg against the ship, claiming to recover against the ship and her freight in respect of all the cargo which by the said bills purported to have been, but had not in fact been, shipped on board the vessel; and on December 7 the ship was sold by the order of the German Court. She realized the sum of 37,940*l*., making together with her freight the sum of 43,206*l*. The total amount of the claims delivered into the said court against the proceeds of the ship and her freight amounted to about 76,000*l*., and thereupon the Court made out and published a scheme for the division of the fund in court called a Theilungsplan. In this Theilungsplan the

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defendants, through their agents, Berenberg, Gossler & Co., put forward their claim under the said bills of lading. By the German Commercial Code, art. 757, "The rights of a ship's creditor are acquired by virtue of the following claims, viz.:—(8.) Claims for non-delivery of or damage to goods forming part of cargo." Art. 758: "Ship's creditors to whom the vessel has not already been bottomried have a legal lien upon the vessel and its appurtenances. The lien may be enforced against third parties who may have possession of the vessel." In these proceedings the plaintiff James Laing appeared and disputed the defendants' claim. The plaintiff company, though it had notice of the proceedings, did not appear. By the judgment of the Landgericht (the Court of First Instance), dated April 8, 1893, the defendants' claim was allowed, and priority was given to it over the claims of all the other claimants (including that of James Laing), except claims for the necessary expenses of prosecuting the voyage from Bombay to Hamburg, and the claims of the captain and crew for wages and disbursements. From that decision Laing appealed to the Ober-Landgericht (the Appeal Court), which on November 1, 1893, affirmed the decision of the Court below. Laing again appealed to the Reichsgericht at Leipzig (the Supreme Court of Appeal of the German Empire); but the decision in the defendants' favour was again affirmed. In June, 1894, the defendants through their agents, Berenberg, Gossler & Co., received from the German Court the sum of 10,944*l.*, part of the proceeds of the sale of the *Minna Craig* and her freight in satisfaction of their claim. On August 13, 1894, the present action was brought by the plaintiff company in liquidation, claiming that the said sum of 10,944*l.* should be handed over by the defendants to the liquidator for distribution amongst the plaintiffs' creditors generally. The defendants pleaded (inter alia) that the judgments pronounced in the German court and the said Theilungsplan were a final determination of the matters therein dealt with, and were binding upon the plaintiff company.

Joseph Walton, Q.C., and *H. F. Boyd*, for the plaintiffs.

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Even if the judgment of the German Court is to be treated as a judgment in rem and as binding upon the plaintiff company although not parties to the proceedings in that court, still the defendants are not entitled to retain the money for their own use. They recovered it only as trustees for the liquidator. For the proceedings instituted against the ship were commenced subsequently to July 20, the date of the commencement of the liquidation, and the final adjudication of the 10,944*l.* to the defendants was not until long after the winding-up order had been made. But as soon as proceedings for the winding-up of a company are commenced all property belonging to the company at that date becomes impressed with a trust in favour of the general body of the creditors. It has long been the law in bankruptcy that if after the commencement of the bankruptcy a creditor residing in this country attaches money of the debtor abroad the trustee may recover from the creditor any money received under the attachment as money had and received to his use: *Hunter* v. *Potts* (1); *Sill* v. *Worswick*. (2) And the same rule obtains in the liquidation of companies. In *In re Oriental Steam Co., Ex parte Scinde Ry. Co.* (3) it was held that where a company has been ordered to be wound up judgment creditors resident within the jurisdiction will not be allowed to attach property of the company abroad; and the same principle must apply to any attachment executed abroad between the date of the petition and that of the winding-up order, if the creditor had notice of the petition, as was the case here; for by s. 84 of the Companies Act, 1862, the winding-up is deemed to commence at the time of the presentation of the petition for the winding-up. If an ordinary trustee under an express trust were to sue in rem in a foreign court it could not be disputed that he would be liable to account to his cestui que trust, and no distinction can be drawn in this respect between an express trust and one which is implied. The defendants cannot be allowed to get an advantage by suing abroad, which they could not have got if they had sued in this country.

Sir R. T. Reid, Q.C., and *English Harrison*, for the

(1) (1791) 4 T. R. 182. (2) (1791) 1 H. Bl. 665.
(3) (1874) L. R. 9 Ch. 557.

defendants. The courts of this country do not assume jurisdiction to overrule the decisions of foreign tribunals of competent jurisdiction where those decisions are in rem. In *Castrique* v. *Imrie* (1), where a foreign court in the course of a proceeding in rem against a ship ordered the ship to be sold, it was held that the title of the purchaser of the ship could not be impeached in this country. Nor can the plaintiffs in the present case impeach the title of the defendants to the proceeds of the sale. Those proceeds cannot be regarded as impressed with a trust in this country for the general body of creditors. For the claims of the other creditors are competing claims, and the decision of the German Court that the defendants were entitled in priority to all other claimants is conclusive. No case is to be found in which an adjudication of a foreign court in a proceeding in rem has been reversed in this country. In *In re Oriental Steam Co., Ex parte Scinde Ry. Co.* (2), the proceedings were only in personam. The Court there had no power to determine that the property was the property of the litigant and did not profess to do so. If in the Scottish Courts money is arrested *fundandæ jurisdictionis causâ* and a decree given in favour of the pursuer, the Courts here, though they may dispute the validity of the decision if sought to be enforced on English assets, will not allow it to be impeached so far as it concerns the money arrested, the decision being pro tanto a judgment in rem.

Boyd, in reply.

Cur. adv. vult.

COLLINS J. This is an action brought by the liquidator of an English company, which owned a ship called the *Minna Craig*, to recover a sum of 10,944*l.* from the defendants. While the *Minna Craig* was at Bombay, preparatory to sailing on a voyage to Hamburg, her captain was induced by fraud to sign bills of lading for cargo that had never in fact been shipped. The defendants, having become bonâ fide indorsees for value of certain of the said bills of lading, indorsed them over to their agents at Hamburg, Messrs. Berenberg & Gossler. On the

(1) (1870) L. R. 4 H. L. 414. (2) L. R. 9 Ch. 557.

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arrival of the ship at Hamburg, Berenberg & Gossler took proceedings to arrest the ship; and ultimately, by a judgment of the German Court, the ship was ordered to be sold, and the priorities of the different persons claiming rights against the ship were determined. By that judgment Berenberg & Gossler were declared to have a right to the proceeds of the sale in priority to every one except the crew, who sued for wages, and a person who had supplied necessaries for the purpose of the voyage. They were held to have priority over every one else, including an English mortgagee, Mr. Laing, who acquired a mortgage on the ship long before she went to Bombay. On the very day on which these proceedings in Germany against the ship were commenced a winding-up order was made in England for the winding up of the plaintiff company. The petition upon which that order was made was filed as far back as July 20, and all the necessary advertisements were duly published. Therefore it must be taken that the defendants, the Chartered Mercantile Bank, had notice of proceedings which in England would have debarred them from asserting their claim against the *Minna Craig*. Had they attempted such proceedings in an English Court, they would have been restrained. Under those circumstances, the defendants having recovered through their agents the sum of 10,944*l.*, which was the sum allotted to them out of the proceeds of the sale by the German Court, this action has been brought by the liquidator, who was not a party to the proceedings in the German Court, to compel them to refund the sum so recovered; and the question is whether they are liable to refund it. The defence put forward by the defendants was, that the proceedings in Germany were proceedings in rem, and that the determination of the priorities of the several claimants and the distribution of the proceeds were all parts of a proceeding in rem, and were consequently binding upon all persons, irrespective of whether they were parties to the suit or not, and in support of that defence the case of *Castrique* v. *Imrie* (1) was referred to. The plaintiffs' counsel, on the other hand, while not actually admitting that the judgment of the German Court was a judgment in rem, only

(1) L. R. 4 H. L. 414.

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very faintly argued that it was not. The point on which they relied was that, assuming the judgments to have been judgments in rem, and therefore conclusive against the ship itself, being the property of a company in liquidation, was affected with a trust in favour of the general body of the creditors, and that any person who, having notice of that trust, obtained a judgment against the ship declaring him to have a lien upon her, must be held to take that lien subject to the equity of recouping to the liquidator any portion of the proceeds that he received.

As I was naturally anxious not to give effect to a contention on the part of the defendants which, if upheld, would entirely alter the position of the parties according to English law, and would give the holder of a bill of lading rights which by English law he never possessed, and enable him to enforce them in a manner which the English law would disallow, I took time to go carefully through the proceedings in the German Court in order to satisfy myself whether they were or were not proceedings in rem. I have come to the conclusion that they were practically undistinguishable from those which in *Castrique* v. *Imrie* (1) were held by the House of Lords to be proceedings in rem and not merely a roundabout method of getting execution upon a judgment in personam. I think the main arguments that were successfully used in *Castrique* v. *Imrie* (1) apply to this case. It is true that the words "par privilége sur ce navire" are wanting here, but I do not think that makes any real difference. The proceedings were taken against the ship; the liability was limited to the value of the ship; and in each of their judgments the German Courts refer to the right of the bill-of-lading holders as a lien. Therefore I must treat the decision as one in rem.

What, then, is the effect of a decision in rem? The point has been very recently considered in the Court of Appeal in *Ballantyne* v. *Mackinnon*. (2) There the question was, As to what is a judgment in rem in a salvage action conclusive? And Smith L.J. in delivering the judgment of the Court said:

(1) L. R. 4 H. L. 414. (2) [1896] 2 Q. B. 455.

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"Now, what was 'the point' decided by the judgment in rem in the Admiralty Court in the present case? It was that a valid maritime lien to the amount of 350*l.* attached to the steamship *Progress*, and that to this extent its status was conclusively determined." Well, so here there was a determination as to the status of the ship, and a declaration of a lien to the extent of 10,944*l.*, which has been satisfied by the Court awarding that sum out of the proceeds. Now, viewing this case by the light of that decision, which I cite as the latest of a long series establishing the same principle, I apply the authority mainly relied on by Mr. Walton, namely, *Oriental Inland Steam Co., Ex parte Scinde Ry. Co.* (1) It was there held that, where a company is in liquidation in this country, a creditor resident here who has obtained a judgment abroad against the company will be prevented from reaping the fruits of that judgment by attaching the company's assets in the foreign country, on the ground that those assets are affected with a trust for the creditors generally. But when so laying down the law, Mellish L.J. added this qualification: "It is said that the assets are subject to the law of the place where they are. I quite agree that if the law of the place where they are had given a charge of that nature on the assets prior to the time when the petition for winding-up was presented, or possibly prior to the time when the winding-up order was made, and a judgment, for instance, had been put on the register, that might by the law of Bombay have constituted a charge on the property of the company, and then the trust for the benefit of the creditors would have been subject to that charge." If, then, there was in point of fact a charge created upon the *Minna Craig*, according to the law of Germany, prior to the petition for winding-up, there can be no question but that the liquidator would take the property subject to that charge. But that there was such a pre-existing charge is the very thing that was decided by the judgment of the German Court. It declared by a judgment in rem that a lien or charge on the ship had according to German law been created by the act of the master in signing the bills of lading, and it gave effect to that lien by ordering the sale of the ship

(1) L. R. 9 Ch. 557.

and distributing the proceeds. Although the judgment which declared the lien was subsequent to the winding-up, the lien itself attached in this view before the winding-up. At all events, whether the judgment is conclusive or not as to the date at which the lien attached, it is a conclusive declaration as to the status of the ship, and I think that the liquidator cannot at one and the same time admit this conclusive status and claim to annul it by virtue of an equity which is really inconsistent with it. No doubt liquidation in this respect stands on much the same footing as bankruptcy, the only difference being that in the latter the legal as well as the equitable estate has passed out of the bankrupt; and in bankruptcy it has been held in more than one case—*Hunter* v. *Potts* (1) and *Sill* v. *Worswick* (2)—that where an English creditor by process of law in a foreign country gets hold of assets which from the English standpoint would be divisible among the general body of the creditors, he cannot retain the proceeds as against the trustee. But those were cases in which the proceedings in the foreign country were in personam, under which the creditor in some form got execution against his debtor, taking of course no more than the debtor himself could give. I have searched carefully, but have been unable to find any case in which a similar rule has been laid down where the proceedings in the foreign Court were in rem. And I think I should be unduly stretching the law if I were to hold that the defendants in this case, who have obtained satisfaction of their claim by means of a foreign judgment in rem, were not entitled to retain the fruits of it as against the liquidator. Judgment must, therefore, be for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Clarke, Rawlins & Co.*

(1) 4 T. R. 182. (2) 1 H. Bl. 665.

J. F. C.

C. A.
1896
Nov. 20

[IN THE COURT OF APPEAL.]

COUNTY COUNCIL OF MIDDLESEX *v.* ASSESSMENT COMMITTEE OF ST. GEORGE'S UNION.

Poor-rate—Exemption—Crown Purposes—County Council—Joint Occupation by Quarter Sessions and County Council—Rateability.

Premises used by a county council for the purposes of the administrative business of the county are not exempt from rating.

Where premises were jointly occupied by the quarter sessions of a county and by the county council for administrative purposes:—

Held, that the county council were rateable in respect of their occupation of the premises.

APPEAL from the judgment of a Divisional Court (Cave and Wills JJ.) (1) upon a case stated on an appeal against a valuation list to the quarter sessions for the county of London pursuant to s. 40 of the Valuation (Metropolis) Act, 1869.

In a supplemental valuation list for the united parishes of St. Margaret and St. John the Evangelist, Westminster, in the St. George's Union, made and deposited under the Valuation (Metropolis) Act, 1869, on or about May 31, 1894, the name of the Middlesex County Council was inserted as that of the occupiers of "that part of the Guildhall, Westminster, being the county hall, committee-rooms, offices, office of the county surveyor, vaults, and rooms used by the caretaker, and such parts of the building as are used by the Middlesex County Council for administrative purposes as distinguished from Crown purposes"; and they were assessed in respect of such occupation at 225*l.* gross value, and 188*l.* rateable value. Certain portions of the Guildhall, such as the courts, witnesses' waiting-rooms, prisoners' cells, prison warders' rooms, counsels' and counsels' clerks' rooms, and jurymen's rooms are used exclusively by the quarter sessions, subject to this, that the courts are occasionally used by the county council for the purpose of hearing applications for music and dancing licences. Other rooms in the building are used exclusively by the county

(1) [1896] 2 Q. B. 143.

council. Others are used jointly by the county council and the quarter sessions, such as the offices used by the clerk of the peace, who is also ex-officio clerk of the county council, and by his deputy and staff. One room is used jointly by the Lord Lieutenant and Custos Rotulorum of the county of Middlesex and the clerk of the peace on his behalf, and by the county council for the purpose of storing the records of courts of quarter sessions and other public records of the county of Middlesex, and also documents of the county council.

The questions for the opinion of the Court were as follows:—

(*a*.) Is the said Guildhall or any and what part thereof rateable and within the description of rateable property the subject of the Valuation (Metropolis) Act, 1869?

(*b*.) Upon what principle is the said Guildhall or any rateable part thereof to be valued and assessed for the purpose of the poor or other rates?

(*c*.) Is the question whether the parts of the building used by the county council exclusively are capable of being let separately from the rest of the building material?

It was agreed by the parties to the appeal that the amount of the valuation should be fixed (if not agreed) by an arbitrator in accordance with the decision of the Court after the determination of the case. The Divisional Court gave judgment to the effect that the county council were rateable in respect of the part of the building occupied by them exclusively, and with regard to the part occupied by them and the quarter sessions jointly they were rateable proportionally to the extent of their occupation.

Danckwerts, for the county council. No part of this building is rateable. Premises are exempt from rates if occupied for public purposes such as by the constitution of this country fall within the province of Government, and must therefore be deemed Crown purposes. *Mersey Docks* v. *Cameron* (1); *Coomber* v. *Justices of Berks*. (2) It is contended that the purposes for which the Guildhall, Westminster, is used are all Crown purposes in the sense of being Government

(1) (1865) 11 H. L. C. 443. (2) (1883) 9 App. Cas. 61.

C. A. 1896

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purposes. The county councils (other than the London County Council) only perform those administrative functions which were formerly performed by the justices of the county in quarter sessions as servants of the Crown and for the purposes of county government. There are decisions which shew that, when the quarter sessions performed these functions as well as judicial functions, the buildings used by them for both purposes were entirely exempt from rateability on the ground that they were occupied for Crown or Government purposes: *Nicholson* v. *Assessment Committee of Holborn Union* (1); *Reg.* v. *Justices of Worcestershire*. (2) The nature of the purposes for which the premises are used cannot depend on the persons who carry them out. If these were Crown purposes when the justices in quarter sessions carried them out, they must still be Crown purposes when the functions of the justices are transferred to the county council. The exemption attached to the nature of the services performed, not to the quality of the persons who performed them. If the building is mainly used for judicial and Government purposes, the Court will not be nice to pick out particular parts here and there which may be used for other purposes: see *Martin* v. *Assessment Committee of West Derby Union* (3); *Pearson* v. *Assessment Committee of the Holborn Union*. (4)

Secondly, if the county council are rateable in respect of any portions of the building, the Court are to say in respect of what portions they are so rateable. The Court below have not laid down the right test by which to determine that question. It is contended that in that case the proper principle is that the building is not rateable with the exception of the portions used exclusively by the county council. All portions of the building which are used by the justices are exempt as being used for Crown purposes, and the fact that some of them are to a certain extent used by the county council also does not destroy that exemption. [He also cited *Hodgson* v. *Local Board of Carlisle* (5); *Greig* v. *University of Edinburgh*. (6)]

(1) (1886) 18 Q. B. D. 161.
(2) (1839) 11 A. & E. 57.
(3) (1883) 11 Q. B. D. 145.
(4) [1893] 1 Q. B. 389.
(5) (1857) 8 E. & B. 116.
(6) (1868) L. R. 1 H. L., Sc. 348.

Bosanquet, Q.C., and *Ryde*, for the assessment committee. The only ground of exemption is that the Crown is not named in the statute 43 Eliz. c. 2. When the administrative business of the county was done by the justices as such at quarter sessions, there was a difficulty in distinguishing between their judicial and administrative functions for rating purposes, because they might be said to perform both in the capacity of servants of the Crown. But the county council, when occupied with the administrative business of the locality, cannot be said to be carrying out Imperial purposes or acting as servants of the Crown, and the premises occupied by them for the purposes of such business are therefore rateable. It may be that, even before the passing of the Local Government Act, 1888, if the justices had occupied separate premises for judicial and administrative purposes respectively, the premises occupied for the latter purposes would have been rateable, but it is not necessary, for the purposes of the present case, to go the length of contending for that proposition. The same difficulty does not arise in the case of the county council, who do not act in any sense as servants of the Crown in transacting the administrative business of the county. The county council occupy and have the control of the whole of this building. It is not sought, however, to treat the county council as rateable in respect of those portions of the building which are used as courts or appendages thereto, though they are used to a certain extent by the county council also. Such user by the county council is trifling and may be disregarded. In respect of the other parts of the building, it is contended that the county council are rateable. With regard to the parts which are occupied by the quarter sessions and the county council jointly, there is no cross-appeal against the judgment of the Court below as to the amount of their rateability. The only question, therefore, which is raised before this Court is simply whether they are rateable. It is contended that there can be no exemption unless there is an occupation exclusively for Crown purposes.

[They cited *County Council of Durham* v. *Assessment Committee of Chester-le-Street*. (1)]

(1) [1891] 1 Q. B. 330.

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Danckwerts, in reply. It is contended that the county council are not really the occupiers of this building. It is used for the joint purposes of the quarter sessions and the county council, and by officers who are common to both bodies. It is therefore legally under the control and management of the joint committee appointed by the quarter sessions and the county council under ss. 30 and 64 of the Local Government Act, 1888 (51 & 52 Vict. c. 41).

LORD ESHER M.R. The name of the county council is inserted in the valuation list as that of the occupiers of property which is described as being "that part of the Guildhall, Westminster, being the county hall, committee-rooms, offices, office of the county surveyor, vaults, and rooms used by the caretaker, and such parts of the building as are used by the Middlesex County Council for administrative purposes as distinguished from Crown purposes." The county council object to being so entered in the list; and thereupon a case has been stated, and the questions which it is sought by the case to have determined are whether the Guildhall, or any and what part thereof, is rateable, and upon what principle the Guildhall or any rateable part thereof is to be valued and assessed. No question is asked by the case, nor was any point raised until the very end of the argument, as to whether the county council occupy the premises. That being so, we have only to consider the question raised by the case. The question we have to determine is whether the county council, being the occupiers, are rateable for those parts of the building in respect of which they have been inserted in the list. The Divisional Court have held that they are, and we have to consider whether their decision is correct. The building is used in this way. A portion of it is used by the justices, and was treated in argument as used by them only, for the performance of their judicial functions as forming the court of quarter sessions. Parts of the building are used by the justices jointly with the county council, as I gather, not for the performance of any judicial functions, but for certain administrative purposes. Other parts of the building are not used by the justices at all, but are used exclusively by the county council

for the performance of those functions which the Act of Parliament has entrusted to them. It was argued for the county council that no part of the Guildhall is rateable: that not only the part of the building used exclusively by the justices for judicial purposes was exempt, but that the part of the building used exclusively by the county council, and the part used jointly as before mentioned, were also exempt. No question now arises with regard to the part which is used for judicial purposes. The only question is as to the other parts. It is argued that no part of the building is rateable, because the whole must be taken to be occupied for public or Crown purposes. That contention appears to me to be contrary to several decisions. As I understand the effect of the decision in *Mersey Docks* v. *Cameron* (1), I should be disposed to say that, according to the principle there laid down, in a case where premises were occupied by the justices for judicial purposes, and separate premises were occupied by them for the administrative business of the county only, the latter would have been rateable. But the present case is stronger. Here part of the building is occupied not by the justices at all, but by the county council only. It is so occupied by them for purposes which are no doubt public purposes, but which do not come within the definition of Crown purposes as laid down in *Mersey Docks* v. *Cameron* (1) by Lord Westbury L.C. and in the judgment of Blackburn J., which was adopted by the House of Lords. By that definition a distinction is drawn between Crown purposes and other public purposes which has been made the test of rateability. The decision of the House of Lords in that case appears to me to shew clearly that the part of the building used by the county council and not by the justices for any purpose must be rateable. Then, with regard to the part of the building which is used by the county council and also by the justices, if the justices had used that part for judicial purposes, another question might have arisen which I think we are not now called upon to decide. It appears that that part of the building is used by the justices jointly with the county council, not for judicial but administrative purposes, which would not come within the definition of Crown purposes.

(1) 11 H. L. C. 443.

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It seems to me that, under those circumstances, the fact of it being so used cannot prevent the county council who also use it from being rateable in respect of it. Upon these considerations I think that the judgment of the Divisional Court cannot be found fault with. But it is suggested that the Court ought to have specifically determined what rooms of the building were rateable. What the Court appears to have done is to lay down the principle by which to determine what portions of the building are rateable, and to have said that a skilled person acting on that principle would have no great difficulty in dealing with the matter. I cannot say that I think they were wrong in so dealing with the case. For these reasons the appeal must be dismissed.

LOPES L.J. I am of the same opinion. The county council have been inserted in the list as rateable in respect of so much of the Guildhall as is in their occupation; and they claim exemption on the ground that the purposes for which they occupy are public purposes. The liability to poor-rate depends upon the statute 43 Eliz. c. 2. There is nothing in the express terms of the statute to warrant any exemption. No exemption is conferred by the statute in the case of premises occupied for charitable or any other purposes, except so far as such an exemption may arise from the doctrine that the Crown is not bound by a statute unless expressly mentioned. For many years prior to the decision in *Mersey Docks* v. *Cameron* (1) some laxity of interpretation had prevailed, and premises which were occupied for purposes which could not be described as Crown or Imperial purposes were treated as exempt from rating. But the House of Lords in that case laid down the law very clearly, and it is now well established that the fact that buildings are used for public purposes confers no exemption, unless such purposes are Crown purposes. As Lord Westbury L.C. said in giving judgment, in order to afford a ground of exemption the public purposes must be such as are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the Crown. I am inclined

(1) 11 H. L. C. 443.

to think that prior to 1888 the whole of this building would have been held exempt from rating on the ground that it was used for judicial purposes; because at that time the administrative business of the county was done by the justices in quarter sessions assembled as such, and by virtue of the authority which they derived from the Crown. But in 1888 a great change took place. The judicial business of the county continued to be performed by the justices in quarter sessions; but the administrative business was transferred to the county council, who in performing their functions do not act by virtue of any judicial office, or as being servants of the Crown. It appears to me that the exemption from rating can only apply to that portion of the building which is used for Crown purposes. Therefore, so much of the building as is occupied for Crown purposes, such as the administration of justice and police business, is not rateable, because it stands on the same footing as premises occupied by servants of the Crown; but so much as is occupied by the county council for administrative or municipal purposes is rateable. This appears to me to be clearly the correct principle to apply, although it may be to some extent a difficult task to apportion the building and say how much is used by the county council and how much by the justices as servants of the Crown; and the task is more difficult still where a portion of the building is used partly by the county council and partly by the justices. It was ingeniously contended by the counsel for the county council that, when the administrative duties of the justices were transferred to the county council, though no longer performed by the justices virtute officii, they must still be considered as imperial services, and the exemption continued to attach; that the exemption attached to the quality of the services, not that of the body by whom they were performed. Upon consideration I do not think that argument tenable. For the reasons which I have given I think the appeal must be dismissed.

RIGBY L.J. The first question is whether premises which the county council occupy for the purpose of performing their administrative duties are rateable under the statute 43 Eliz.

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c. 2. The suggestion that such premises are exempt from rating would, I think, appear a very extraordinary one, but for the history of the cases on the subject, in which the existence has been supported of exemptions that are not to be found anywhere in the statute itself, and are not strictly in respect of Crown purposes. There is no doubt that for a long period before the decision in 1865 of the case of *Mersey Docks* v. *Cameron* (1) an opinion had prevailed with regard to the existence of such exemptions which was held in that case to be erroneous. Were it not that the House of Lords appears to have hesitated to say that the cases in which such exemptions had been held to exist prior to their decision must be taken to be absolutely overruled, I should have been disposed to say that those cases were not any of them now authorities on the subject. It appears to me, however, that there is not any case prior to *Mersey Docks* v. *Cameron* (1) which can be brought forward as an authority governing the present case. Here we have to determine whether the part of this building used by the county council for the administrative business of the county is within the statute 43 Eliz. c. 2. If there had been a series of cases prior to the decision in *Mersey Docks* v. *Cameron* (1) to the effect that premises so used were exempt, we should have had to consider whether a long series of mistakes had, on the principle that communis error facit jus, become irreparable except by further legislation. But I do not find anything of the sort. There are undoubtedly cases in which justices in quarter sessions have been held for this purpose to be representatives of the Crown, though Lord Blackburn seems to have felt some difficulty in seeing how that could be so in *Coomber* v. *Justices of Berks*. (2) But there appears to be no case in which a body like the county council, that occupied premises solely for administrative purposes connected with a particular locality, has been held exempt from being rated in respect of such occupation. It seems to me therefore that we have only to go back to the statute 43 Eliz. c. 2 itself, there being no series of constraining decisions to lead us to a conclusion other than that to which our reasons

(1) 11 H. L. C. 443.

(2) 9 App. Cas. 69, 70.

would lead us. When the matter is so looked at, I do not see how there can be any doubt about it. I do not say anything about the question which was suggested as to the occupation of the premises by the county council, for it appears to me that for the purposes of the case it is assumed that they are the occupiers. There is a question as to portions of the building which are not exclusively in the occupation of the county council, or exclusively used by the justices. I confess I should have some difficulty in saying that there was any exemption at all in respect of these portions of the building, if that question had been raised, but I think that it is not raised and is not before us, and therefore I do not wish to express any opinion about it. But to the extent to which the county council uses these parts of the building, I do not entertain any doubt that they are rateable, and therefore were properly inserted in the list in respect of them. On consideration of the judgment of the Court below I think that they have taken the true distinction in laying down the general principle applicable to the case; and they have taken precautions against any difficulties which may arise when the case is referred to an expert to make an apportionment in respect of the user of the premises for the two sets of purposes respectively, for they have retained the case before themselves in order that they may deal with any question that may arise.

Appeal dismissed.

Solicitor for appellants: *R. Nicholson.*
Solicitor for respondents: *W. J. Fraser.*

E. L.

1896
Nov. 27.

TUBBS *v.* WYNNE.

Vendor and Purchaser—Conditions of Sale—"Outgoings"—Agreement by Vendor to discharge Outgoings up to Completion—Order to take down dangerous Structures—Expenses of Demolition—Liability of Vendor.

By conditions of sale of land within the metropolis the date fixed for completion was May 8, all outgoings up to that day being cleared by the vendor. Before May 8 a magistrate made an order to take down dangerous structures on the land. This order was not complied with, and after May 8 the county council took down the structures, and demanded and received from the purchaser the expenses of so doing:—

Held, that, the liability having been incurred before May 8, the expenses were "outgoings," within the meaning of the conditions, which the purchaser was entitled to recover from the vendor.

Midgley v. *Coppock*, (1879) 4 Ex. D. 309, followed.

In re Boor, Boor v. *Hopkins*, (1889) 40 Ch. D. 572, distinguished.

ACTION tried before Collins J. without a jury.

The claim was for money paid, and was described in the particulars on the writ as follows: "Amount paid by the plaintiff to the London County Council for the defendant and at his request for expenses duly incurred by the London County Council acting under the provisions of the Metropolitan Building Acts, 1855 and 1869 (1), and the Local Government Act, 1888, and payable by the defendant under dangerous structures notices," &c.

The material facts and dates were as follows:—

On March 30, 1893, a contract was entered into by which the defendant agreed to sell, and the plaintiff agreed to buy, certain land and buildings in the parish of St. Luke, in the county of London.

The contract was subject to certain printed conditions of sale, of which the following provisions are material:—

"3. The remainder of the purchase-money shall be paid, and the purchase shall be completed, on the 8th day of May next.

(1) These Acts have been repealed, since the cause of action arose, by the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 215. The provisions relating to dangerous structures are now contained in Part IX. of the Act of 1894, ss. 102–114.

. . . . The purchaser shall be entitled, after completion of the purchase, to possession, or to the receipt of the rents and profits (if any) of the property, from the said 8th day of May next, all outgoings up to that day being cleared by the vendor, and all current rents, rates, and outgoings shall, if necessary, be apportioned for the purposes of this condition by the auctioneer in writing. . . ."

"6. The property is sold subject to existing tenancies, and to all easements, public or private rights of way, water, and drainage, or otherwise, and to all obligations (if any) as to drains or party walls affecting the same. . . ."

The following condition was added in writing: "The vendor reserves the right to comply with any requirements of the London County Council and authorities, with respect to the condition of the buildings, before completion of the purchase, notices having been served as to pulling down part of same."

After some delay and negotiations the conveyance was executed, and the purchase completed, on October 13, 1893.

In January, 1893, notice to pull down certain buildings on the land in question, which had been certified as dangerous structures, was given to the defendant by the London County Council. On March 4, 1893, a summons was taken out to compel compliance with the notice, and at the adjourned hearing of the summons on April 11, 1893, the defendant consented to an order to pull down the buildings within twenty-eight days. After May 8, 1893, the buildings not having been pulled down, the London County Council gave orders to their contractors to pull them down, which was done in the summer of 1893. (1) The London County Council demanded from the plaintiff the expenses incurred in pulling down the buildings, which the plaintiff paid to them. This action was then brought to recover the amount of such expenses. Notice of trial without pleadings was given, and the action came on for trial before Collins J. without a jury.

A. J. Walter, for the plaintiff. These expenses are recoverable

(1) There were other notices and orders, relating to other buildings on the land, as to which the same question arose.

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by the plaintiff as "outgoings" under the third condition in the contract of sale of March 30. All expenses in respect of which any liability had been incurred at the date fixed for completion, May 8, are recoverable under that condition. An order to pull down the buildings had been made before May 8, and the defendant was then in default in not having complied with such order. If the defendant had done what he ought to have done, namely, complied with the order by pulling down the buildings before May 8, it is clear that the expenses incurred by him in so doing would have been "outgoings" within the meaning of the third condition, and if under the existing circumstances he is held not to be liable, he will be placed in a more advantageous position owing to his own wrongful default. The case is governed by the decision of the Court of Appeal in *Midgley* v. *Coppock*. (1) There, as here, the question arose as between vendor and purchaser, and it was held, under circumstances very similar to those of the present case, that a charge for improving a street was an "outgoing" which the vendor had bound himself to discharge, and therefore the purchasers were entitled to recover it from him. The cases on the subject establish that the word "outgoings" has always been construed in the widest sense: *Cross* v. *Raw* (2); *Budd* v. *Marshall* (3); *In re Crawley, Acton* v. *Crawley* (4); *Aldridge* v. *Ferne* (5); *In re Bettingham, Melhado* v. *Woodcock* (6); *In re Duke of Cleveland's Estate, Viscount Wolmer* v. *Forester*. (7)

Charles Gurdon, for the defendant. In the first place, these expenses are not "outgoings" within the meaning of the contract, and, therefore, are not payable by the vendor, and cannot be recovered in this action. This contention is strongly supported by the judgment of Kay J. in the case of *In re Boor, Boor* v. *Hopkins*. (8) Most of the decisions cited on behalf of the plaintiff were cases arising on leases or wills, where the term "outgoings" is used in a wider sense than it bears in a

(1) 4 Ex. D. 309.
(2) (1874) L. R. 9 Ex. 209.
(3) (1880) 5 C. P. D. 481.
(4) (1885) 28 Ch. D. 431.
(5) (1886) 17 Q. B. D. 212.
(6) (1892) 9 Times Rep. 48.
(7) [1894] 1 Ch. 164.
(8) 40 Ch. D. 572.

contract of sale. *Midgley* v. *Coppock* (1) is distinguishable, for in that case the charge for improving the street could be levied by distress under the local Act, which made it different from a mere personal payment to be made by the owner. Secondly, assuming that these expenses could properly be described as "outgoings," they did not become such until the work had been done by the county council, and the liability to pay the amount had come into existence. This did not take place until after May 8; so that, if that is the date to be considered, the defendant cannot be held liable. [He also referred to *Hill* v. *Edward* (2); *Egg* v. *Blayney*. (3)]

A. J. Walter replied.

COLLINS J. This case raises a somewhat nice question, which arises in this way. A contract was entered into on March 30, 1896, by which the defendant agreed to sell certain land to the plaintiff. The buildings which were on this land had before that date been certified as dangerous, and a notice had been given by the county council requiring that they should be pulled down. A summons was taken out, and an order to pull down the buildings was made before May 8, which was the date fixed by the contract for the completion of the purchase. The question now arises, What are the rights of the parties? The defendant, the vendor, was, on May 8, under an order to pull down the buildings, which order he did not carry out. After May 8 the county council did the work, and put pressure upon the plaintiff to compel him to pay the expenses. (4)

The plaintiff now sues the defendant to recover the amount of the expenses so paid. It is not suggested on behalf of the plaintiff that he would be entitled to recover on the mere fact that he was the purchaser of land which was subject to an

(1) 4 Ex. D. 309.

(2) (1885) W. N. 32.

(3) (1888) 21 Q. B. D. 107.

(4) By 18 & 19 Vict. c. 122, ss. 73, 74, expenses incurred in respect of dangerous structures were payable by the owner, and if he could not be found, or refused or neglected to pay, the structure could be sold, and by 41 & 42 Vict. c. 32, s. 19, where the proceeds of sale were insufficient to pay the expenses, the land could not be built upon until the balance had been paid.

Similar provisions are contained in the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 109–111.

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order that the buildings should be pulled down. He relies on the third condition of the contract, and contends that the sum which he has paid was paid for a liability, which was absolute before May 8. That is the governing date, shewing the dividing line by which the rights and liabilities of the parties are to be determined. Now, in order to bring the expenses in question within the third condition of the contract, the plaintiff must shew that they were "outgoings." Mr. Gurdon for the defendant takes two points. He contends, first, that the expenses are not outgoings, and, secondly, that, if they are outgoings, they did not become such until after the date fixed for completion. In order to arrive at a decision, I must deal with both points. As to the first point, the question arises whether, if the work had been done by the defendant before May 8, the plaintiff could have called on him to bear the expense of that work. I am of opinion that he could. I think that under those circumstances the plaintiff would have been entitled to be exempted from bearing these expenses, because they would have been outgoings. A number of cases have been cited in argument; it is not very easy to collect any definite principle from those decisions, but this does appear to be established, that the word "outgoings" is the largest word which can be used. One of those cases was a case arising between vendor and purchaser—*Midgley* v. *Coppock*. (1) In that case the plaintiffs bought of the defendant three houses, and by the contract of sale the defendant agreed to discharge "all rates, taxes, and outgoings," up to the time of completion. After completion the plaintiffs had to pay for expenses incurred before the sale, under a local Act, in improving the street. The Court of Appeal held that the charge for improving the street was an "outgoing," which the defendant had bound himself to discharge, and that the plaintiffs were entitled to recover it from him. That appears to me to be very much the same as the present case. I cannot see any distinction between the nature of the expenditure which was in question in that case and the nature of the expenditure which is in question here. In that case payment of the expenditure could be levied by distress; here the county council had

(1) 4 Ex. D. 309.

power to sell the structure, and interfere with the use of the land. (1) I can see no distinction in principle between the two cases. I am of opinion, therefore, as to the first point, that the expenses in question are covered by the expression "outgoings." As to the second point, it was contended that there were no outgoings, within the meaning of the contract, until the expenses had been actually incurred, and in support of that contention the case of *In re Boor, Boor* v. *Hopkins* (2), was relied on. In that case a deed of gift of two houses assigned them to the son of the lessee, upon trust to pay the rents and profits to his father for life, the father paying all outgoings. Notices were served on the father under the Public Health Act, 1875, requiring him to make up portions of the road. He did not comply with the notices, and the local board did the work. Shortly afterwards the father died, and after his death notices assessing the expenses were served on the son, and payment was demanded from him. It was held that these expenses were not outgoings, which could be recovered by the son from the father's estate. In giving judgment Kay J. said: "It would have been an outgoing in his lifetime, if the amount had been assessed in his lifetime, and a claim enforced against him under a summary procedure. But how was this an outgoing under the terms of that deed, when the fact is that no such proceeding ever was taken, no personal claim was made against him, and there is no remedy against his estate, because the time has passed and the remedy is barred?" (3) The question arises whether that decision covers the present case. I am of opinion that it is distinguishable, on the ground that in that case there was no obligation on the father in his lifetime, so that there were no outgoings until after the property had passed by death from the father to the son; but the present case is altogether different, for there was a direct order made by the magistrate before May 8, and the vendor was then in default by reason of his disobedience to that order. It would be a strong thing to say that, by disobeying the order of the magistrate, the defendant could escape from a liability, which

(1) See ante, p. 77, note (4).

(2) 40 Ch. D. 572.

(3) 40 Ch. D. at p. 577.

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he would have incurred if he had obeyed the order, and, as I have already pointed out, had he obeyed the order the expenses thereby incurred would have been outgoings within the meaning of the contract.

For these reasons I am of opinion that the plaintiff is entitled to recover in respect of all outgoings up to May 8.

Judgment for the plaintiff.

Solicitor for plaintiff: *Leonard Tubbs.*
Solicitors for defendant: *Pearce & Sons.*

P. B. H.

1896
Oct. 28.

BRIDGE *v.* HOWARD.

Adulteration—Food and Drugs—Certificate of Analysis, Sufficiency of—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 18.

In a prosecution under the Sale of Food and Drugs Act, 1875, for selling adulterated milk, the certificate of the public analyst stated that the sample submitted to him contained 6 per cent. of added water, and went on to say, "This opinion is based on the fact that the sample contained 7·97 per cent. solids not fat, whereas genuine milk contains not less than 8·5 per cent. solids not fat":—

Held, that the certificate was good, although it did not state the constituent parts of the sample analyzed.

Fortune v. *Hanson*, [1896] 1 Q. B. 202, explained.

CASE stated by justices under the Summary Jurisdiction Acts.

The appellant, an inspector of weights and measures, laid an information against the respondent, for that he did sell a certain article of food, to wit, milk, which was not of the nature, substance, and quality of the article demanded, but contained 6 per cent. of added water.

It appeared that on March 25, 1896, the appellant purchased from the respondent a pint of milk, and, having duly complied with the requirements of the Sale of Food and Drugs Act, 1875, and the Acts amending the same, caused part of such milk to be analyzed by the public analyst.

The public analyst duly delivered a certificate, which was, so far as is material, as follows:—

"I do hereby certify that I received on March 26, 1896, a

sample of new milk for analysis, which then weighed about 6 ozs., and have analyzed the same, and declare the result of my analysis to be as follows:—

"I am of opinion that it contains the parts as under:

"Milk, 94 per cent.

"Added water, 6 per cent.

"This opinion is based on the fact that the sample contained 7·97 per cent. solids not fat, whereas genuine milk contains not less than 8·5 per cent. solids not fat.

"The sample had undergone no change which would interfere with the analysis."

At the hearing of the information this certificate was tendered in evidence by the appellant; but the respondent objected that it was bad and inadmissible on the ground that it did not state specifically as the result of the analysis the constituent parts of the sample analyzed.

The justices upheld the objection and dismissed the information, but stated this case for the opinion of the Court. (1)

Earle, for the appellant. The justices were wrong. The certificate is in the form given by the schedule to the Sale of Food and Drugs Act, 1875. No doubt in *Fortune* v. *Hanson* (2) the Court held a certificate bad for not stating the constituent parts of the sample analyzed; but that was because the certificate contained no materials which would enable the justices themselves to say whether the milk had or had not been adulterated. In that case the analyst simply stated in his certificate that he was of opinion that the sample contained a

(1) By the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 13, "Any . . . . inspector of weights and measures . . . . may procure any sample of food . . . . and if he suspect the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analyzed by the analyst of the district or place for which he acts . . . . and such analyst shall . . . . analyze the same and give a certificate . . . . wherein he shall specify the result of the analysis."

By s. 18: "The certificate of the analysis shall be in the form set forth in the schedule hereto, or to the like effect."

The form of certificate given in the schedule is, so far as is material, as follows:—

"I am of opinion that the said sample contains the parts as under, or the percentages of foreign ingredients as under."

(2) [1896] 1 Q. B. 202.

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certain percentage of added water. Here the analyst has given reasons for his opinion of which the justices can judge. The amount of solids other than fat in milk is a constant quantity, and the test by taking the percentage of such solids is a far more satisfactory one than that by taking the percentage of water. It would have added nothing to the information before the justices if the analyst had in addition given the percentages of water and of fat in the sample.

The respondent did not appear.

GRANTHAM J. In this case we are of opinion that the justices were wrong in dismissing the information. I do not think it necessary to refer to the case of *Fortune* v. *Hanson* (1), which seems to me clearly distinguishable. All that we have to determine is whether the analyst has done all that is necessary in this certificate by setting out sufficient information to enable the justices to act. The justices seem to have thought that the certificate was insufficient because it did not specify the quantity of water in the sample; but every one who knows anything of the milk trade knows how unsatisfactory the test by taking the amount of water in a sample is. Without any water having been added to the milk, there is often a great difference between the percentage of water contained in different samples of milk. In this case the analyst has come to the conclusion that water has been added to the milk, and he goes on to state how he arrives at that conclusion. He says that the milk contains a less proportion of solids, other than fat, than genuine milk ought to do, and therefore he is of opinion that water has been added to the milk. It seems to me that the certificate did comply with the requirements of the Act, and that this appeal must succeed.

KENNEDY J. I agree; but as I was a party to the decision in *Fortune* v. *Hanson* (1) I wish to add a few words. In that case the certificate of the analyst merely stated his opinion that the sample submitted to him contained 5 per cent. of added water, and there was nothing which would enable either the

(1) [1896] 1 Q. B. 202.

magistrate or the party charged to say on what that opinion was based. As was pointed out by my brother Hawkins in that case, the Legislature meant that the certificate should state such facts as would enable the justices to come to a conclusion themselves whether the article of food had or had not been adulterated. It was not intended that the analyst should decide the case himself.

Although I still think that the fairest course would be for the analyst to state in his certificate the parts contained in the sample, he is no doubt permitted by the form of the certificate given in the schedule to the Act to set out the percentages of foreign ingredients contained in the sample. What he has done here has been not only to state the percentage of "added water," but also to give the scientific basis on which his conclusion rests; and therefore I think that, while entirely upholding the decision in *Fortune* v. *Hanson* (1), I am yet able to say that the certificate in this case is good and ought to have been received.

The certificate differs from that in *Fortune* v. *Hanson* (1), because it gives the reasons for the analyst's conclusion, and on the information so given the party charged can, if he thinks proper, act, and the justices can form a judgment. Therefore, I am of opinion that there has been a sufficient compliance with the Act, and that the two cases are distinguishable.

Appeal allowed.

Solicitor for appellant: *Richard Nicholson.*

(1) [1896] 1 Q. B. 202.

A. P. P. K.

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Oct. 29.

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*Metropolis—Street Musician—Right of Householder to order Street Musician to depart—Duty to give Reason—*27 & 28 *Vict. c.* 55, *s.* 1.

By 27 & 28 Vict. c. 55, s. 1, any householder within the metropolitan police district may require any street musician to depart from the neighbourhood of his house "on account of the illness or on account of the interruption of the ordinary occupations or pursuits of any inmate of such house, or for other reasonable or sufficient cause":—

Held, that the householder making the requisition must give to the street musician his reason for doing so.

CASE stated by a metropolitan magistrate under the Summary Jurisdiction Acts.

The appellant was an artist residing within the metropolitan district. On April 11, 1896, the respondent, a street musician, was sounding an instrument near the house occupied by the appellant, and the appellant, being thereby interrupted in his ordinary occupations, sent a servant to require the respondent to depart from the neighbourhood of the said house in accordance with 27 & 28 Vict. c. 55, s. 1. The respondent did not depart, but continued to sound the instrument. The appellant then himself required the respondent to depart, and on his neglecting to do so gave him into the custody of a police constable. Neither the appellant nor his servant stated to the respondent the reason why the respondent was required to depart; and the magistrate, although he was of opinion that the appellant had in fact reasonable and sufficient cause for requiring the respondent to depart, held as a matter of law that the true meaning and intent of the statute was, that it was not enough to require a street musician to depart without informing him of the reason why he was so required; and he accordingly discharged the respondent. (1)

(1) By s. 1 of 27 & 28 Vict. c. 55, "Any householder within the metropolitan district personally or by his servant . . . . may require any street musician or street singer to depart from the neighbourhood of the house of such householder on account of the illness or on account of the interrup-

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Sceales, for the appellant. The Act does not say that the reason must be given, and it is absurd to require it. If the musician were to be entitled to know the reason, he would also be entitled to satisfy himself that the reason was true and sufficient. The Legislature cannot have intended that the musician or singer should decide as to the truth or the sufficiency of the reason of the householder for requiring him to depart.

The respondent did not appear.

GRANTHAM J. I think the magistrate was right. Unless the householder who requires a street singer or musician to depart from the neighbourhood of his house gives the reason for so requiring him to depart, the singer or musician cannot tell whether the householder has reasonable or sufficient cause for his requirement; and if he refuses to depart, and is given in charge by the householder, he will not know until the case comes before the magistrate whether he has committed an offence or not. The Act only permits a householder to require a street musician or street singer to depart from the neigbourhood of his house "on account of the illness or on account of the interruption of the ordinary occupations or pursuits of any inmate of such house, or for other reasonable or sufficient cause"; and, therefore, unless there is some such cause, the street musician or singer, in refusing to obey the householder's requirement, commits no offence. It seems only in accordance with the principles of English law that the musician or singer should know at the time that he is required to move away whether his refusal to do so will be an offence or not, and

tion of the ordinary occupations or pursuits of any inmate of such house, or for other reasonable or sufficient cause, and every person who shall sound or play upon any musical instrument, or shall sing in any thoroughfare or public place near any such house after being so required to depart, shall be liable to a penalty not more than forty shillings, or . . . . may be imprisoned for any time not more than three days, and it shall be lawful for any constable belonging to the metropolitan police force to take into custody without warrant any person who shall offend as aforesaid: Provided always he shall be given into custody by the person making the charge."

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whether the householder has a right to ask him to move on. The appeal therefore fails.

KENNEDY J. I agree.

Appeal dismissed.

Solicitor for appellant: *John Swinford Francis.*

A. P. P. K.

C. A. 1896 *Nov.* 3.

[IN THE COURT OF APPEAL.]

WESTERN *v.* BAILEY AND ANOTHER.

Copyhold—Heriot Custom—Heriot Service—Right to seize without the Manor.

A beast which is due to the lord of a manor by heriot custom may be seized without the manor, although the beast has never been within the manor.

Quære, whether a right in the lord of a manor to take a heriot as due by heriot service can exist in the case of copyhold tenements of the manor.

APPEAL from a judgment of Wills J. at the trial of the action without a jury, reported [1896] 2 Q. B. 234.

The plaintiff was the lord of the manor of Mundon Hall, in the county of Essex. The defendants were the executors of George Christy, deceased, who died seised of two copyhold tenements of the manor called respectively Scotts and Langmead. At the time of his death he was not possessed of any beasts then being, or which had at any time been, within the manor, but he was possessed of beasts outside the manor, which the defendants, in ignorance that the plaintiff made a claim to two of them as heriots, sold for the purpose of realizing their testator's estate. The two beasts which were claimed by the plaintiff sold for 63*l.* and 53*l.* respectively. The claim of the plaintiff was that the two tenements above mentioned were heriotable, and that he was entitled on the death of the tenant in respect of each of the tenements, either by heriot custom or by heriot service, to a heriot of the best beast of the deceased tenant; and he brought this action against the defendants for

having by the sale prevented him from exercising his right of seizure.

The learned judge came to the conclusion on the facts that Scotts was not a heriotable tenement, but that as regards Langmead the plaintiff's claim that it was heriotable was made out, and that the plaintiff was entitled by heriot service to a heriot of the best beast. He held, further, that an action would lie for the value of a beast which had been sold and to which the lord was entitled as a heriot. He therefore gave judgment for the plaintiff for 63*l.* (1)

The defendants appealed.

Elton, Q.C., and *J. C. Earle*, for the defendants. This is not a case of heriot service, which is applicable to freeholds and not to copyholds. The right to heriot service depends on bargain, and cannot arise in the case of copyholds, which were originally licences, though ultimately they came to be considered as rights. If a tenement in a manor has been treated as heriotable for a number of years, the presumption should be not grant but custom, and the absence of the custom in the case of other tenements may be explained by such demands having been compounded for in those cases. Of this there are examples on the court rolls. If the claim cannot be based on heriot service it fails altogether, as the custom of the manor can only have effect within the manor, and cannot give rights totally unconnected with it.

Bosanquet, Q.C., and *A. Lyttelton*, for the plaintiff. In Watkins on Copyholds, vol. ii. 163, it is stated that the lord may seize for heriot service as well as for heriot custom, and that, as the property in the best beast becomes vested in the lord on the death or alienation of the tenant, the lord may seize it wherever it may be found. The reason given by Holt C.J. in *Parker* v. *Gage* (2) is that it lies "in prender." *Austin* v. *Bennet* (3) and a case in Keilway's Reports, p. 84, are also cited by Watkins in support of his view. The note to *Lanyon* v. *Carne* (4) is to the same effect. If this view is

(1) [1896] 2 Q. B. 234.
(2) (1688) 1 Show. 81; Holt, 337.
(3) (1693) 1 Salk. 356.
(4) 2 Wm. Saund. 168 a.

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right, it is not material to argue whether this is a case of heriot service or heriot custom. In either case the authorities shew that there is a right to seize off the manor.

Elton, Q.C., in reply. If a beast is the property of the lord, it can be taken wherever it is found; but the authorities do not support the claim made in this case to seize outside the manor a beast that never was within it, or in any way connected with it. They only go to shew that the argument that the claim is local and confined to the manor does not apply where the lord's rights have attached, or where beasts have been eloigned to prevent their seizure.

LORD ESHER M.R. It seems to me that this action is in somewhat a strange form; but it comes to this, that by selling two beasts the defendants have prevented the plaintiff from seizing them as lord of the manor for heriots. The answer set up is that the beasts could not have been seized, on the ground that they were not and never had been on the manor. The learned judge held that one of the beasts claimed could have been seized, and he seems to have put it on the ground that, though it was not proved that the lord had the right to it under the custom of the manor, there was evidence before him that there was an agreement between the lord of the manor originally and the holder for the time being of the tenement that he and his successors should be liable to the heriot, and therefore it was a heriot service, and the lord could seize the beast wherever it was.

It was argued that the claim of the lord could only be proved by the custom of the manor that such a heriot was due, and then it would be a customary heriot, and that the custom was not applicable to beasts without the manor. To this it was answered that the right to seize was by heriot service, and that there was no occasion to prove a custom, but that, assuming the claim to be based on custom, the property in the beast passed just as it would pass on heriot service, and there was a right to seize the beasts outside the manor; so that if the judge was wrong as to the case being one of heriot service, still his judgment for the plaintiff was right. I think this view is sound.

I have great difficulty in seeing how, if the heriot claimed, inasmuch as it is claimed in respect of a copyhold tenement within the manor, is not proved to be due by the custom of the manor, it can be proved to be due at all. If, as the judge has held, and I think rightly held, the right to the heriot has existed from time immemorial, the proper inference seems to me that it is due by the custom of the manor and is a customary heriot; so that I do not agree that it was heriot service, because I think, on the evidence, the proper inference was that it was a customary heriot of the manor.

The authorities shew that, whether in the case of heriot service or heriot custom, on the happening of the event on which the heriot becomes due the property in the best beast, as soon as that is ascertained, passes at once to the lord of the manor. It is not necessary that he should seize it to vest the property in him; it would be sufficient, for instance, if he had previously marked it, or identified it by description. If the property in the beast passed, it is only necessary to appeal to the common law. If a beast be the property of an individual and is, against his will, in the possession of somebody, the owner has a right to it; and if that person misappropriates it the owner has a right of action. Then comes the question whether, in the case of a customary heriot, the property passes so that the lord may seize his heriot wherever it is. This, as it seems to me, is a question settled by authority. It is laid down in distinct terms by Lord Holt, and also in Watkins on Copyholds, and Williams' Notes to Saunders. We cannot fly in the face of all these authorities when there are none the other way. I come, therefore, to the conclusion that the judgment must stand for the plaintiff, and the appeal be dismissed.

LOPES L.J. The practical question in this case is whether the lord of the manor would have been justified in seizing this beast outside the manor. Of the two kinds of heriot, heriot service and heriot custom, the former is founded on reservation or grant, and the latter on the custom of the particular manor. In the circumstances of this case it is not necessary to

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Lopes L.J.

determine whether heriot service can attach to copyhold tenure; but, speaking for myself, I do not see why it should not. If the receipt of such a rent is proved over a vast number of years, I cannot quite understand why it may not be presumed that the lord of the manor, when he granted out the lands of the manor to different persons, may not, in the case of villeins, have come to some arrangement with any or some of them that a certain specified payment should be made. It may be that as time went on that payment became crystallized into a custom, and has become a custom; but I cannot see why a presumption of the kind I have indicated should not be made—why, in point of fact, a legal origin may not be attributed to heriot service in the case of copyholds as well as in the case of freeholds. For the purposes of the present case it is not necessary to decide this point. It is now conceded that what we have to do with is heriot custom; and, to my mind, there is abundance of authority for holding that a heriot can be seized for heriot custom outside the manor.

I may cite, in addition to the authorities that have been mentioned, Comyns' Digest, tit. "Copyhold," K, 25. It is there stated that, "By the death of the tenant the property of an heriot-custom is vested in the lord immediately; and therefore the lord may seize an heriot-custom, but not distrain for it"; and further, "he may seize in any place; but he cannot seize the beast of another." In *Lanyon* v. *Carne* (1) I find: "As the property of it (the heriot) vests immediately in the lord on the death of a tenant, or on an alienation by him, the lord may seize it in any place, though he cannot distrain for it." There is thus abundance of authority; and I think the Court is justified in coming to the conclusion that the lord is justified in seizing without the manor. I have looked at the different pleas that have been pleaded where the lord has had to justify the seizure of a heriot as heriot custom, and I do not find in those pleas any statement that the seizure took place within the manor. I have come to the conclusion that the judgment of the learned judge ought not to be disturbed, and that this appeal should be dismissed.

(1) Wm. Saund. 161, at p. 168 b.

RIGBY L.J. The question we have to decide in this case is whether the lord became entitled to seize as a heriot, on the death of a tenant of the manor, a beast which never had, as I understand, been upon the manor and, at any rate, was not on the manor at the death of the tenant.

At first a question was raised as to whether heriot service, as was held by the learned judge, could attach upon copyholds within a manor. If I had to decide that question I should certainly not be prepared to say that such a thing was possible. It is plain that heriot service can be traced back to some reservation upon a grant; but I cannot see at present how it is possible to arrive at such an origin in the case of a copyhold. It is the custom of the manor that decides all the rights of the copyhold tenant. Without that he is a tenant at will, and if there were not a custom of a mahor he would have no rights at all. That custom must be proved by shewing that it always has been so from time immemorial—from time which is outside legal memory. I do not mean to say that it is necessary to cover the whole period, but evidence must be given within the actual time of documentary evidence producible in the time of living men, and it must be shewn that there has been nothing to the contrary. The legal conclusion is that what is so shewn to exist existed beyond legal memory. Now, I cannot see myself how it is possible to get behind legal memory, or how there can be a further analysis of the facts. When that period is reached there is a state of things which has become custom and nothing else, and, because it is custom, it regulates the rights of the tenants and the lord. How can we go behind that time of legal memory and suggest that, before there was a custom, there may have been a grant, and something arising out of it? In the first place, I do not believe there is any instance of such a presumption ever arising in law. I do not think it is consistent with the position of lord and tenant in the olden times. I do not think it was consistent with a tenancy at will, and a copyholder's estate is still a tenancy at will, except so far as it has been increased and been made better by custom.

Then there comes the other question. At first I thought

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Rigby L.J.

that it was denied that there was any customary heriot due, and the question of whether the claim might be established as heriot service would have been important; but it is now admitted that there is a custom which would entitle the lord to a heriot in respect of the one tenement with which we have to deal. It was explained that there could be no objection to that custom on the ground that it did not extend to all tenements in the manor, because, among other things, it appears to be also a custom of the manor to compound for the heriots, and there are on the court rolls a considerable number of cases in which a composition has been accepted for the heriot, which thereby ceased to be payable. It appears to me it is one of the admitted facts of the case that there was a legal customary heriot payable in respect of this particular tenement. That being so, it was then suggested that, because it was a custom of a particular manor, that custom, as regards all its incidents and effects, would be confined within the ambit of that manor, and that the lord could not go outside the manor to get a beast. One can imagine that on investigation such a limitation could be established; but there is a clear and binding series of authorities that, as a general rule, in the case of a customary heriot the property in the beast vests in the lord. Of course, that is subject to other considerations, because of half-a-dozen beasts not more than one can vest, and, if there is any doubt about it, the lord must choose a beast which he wishes to have considered as his. It was admitted to be the best beast which the lord claimed here, and, according to the general rule, that would at once vest in him the property in that beast by virtue of the custom. The custom, no doubt, must be limited in some way to the manor itself. There cannot be a custom of a manor extending to hereditaments outside the manor; but there is nothing illegal—indeed, it seems to be treated as a general rule—in a custom which vests in the lord the best beast wherever it is found, provided it belongs to the tenant of the manor. In this case we need not trouble about the form of action. Here was a beast, and, if seizable outside the manor, the plaintiff was entitled to that beast or the value of it. There was a

verdict for the plaintiff, and that must be supported, though, so far as I am concerned, upon different grounds to those on which the learned judge based his judgment.

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Appeal dismissed.

Solicitors for plaintiff: *Western & Sons.*
Solicitors for defendants: *Baileys, Shaw & Gillett.*

A. M.

SANDERS *v.* JENKINS.

1896
Nov. 6.

Ship—Charterparty—Demurrage—Place of Discharge.

By a charterparty a steamer when loaded with coal was to proceed to a certain port, "and as usual and customary deliver the same always afloat to the order" of the charterers "alongside any store craft steamer depot ship wharf or arsenal. . . . Time for delivery to count when steamer is ready to discharge." There was only one customary place of discharge at the port in question, and when the steamer arrived at the port that place was occupied. In an action for demurrage:—

Held, that the steamer was not "ready to discharge," and that the time for delivery did not therefore commence until she was at the customary place of discharge in the port.

ACTION tried before Collins J. in the Commercial Court.

By a charterparty dated November 20, 1895, the defendants chartered the plaintiffs' steamship *Albireo* to load coal at Tyne Dock, "and then forthwith proceed to Port Vendres and as usual and customary deliver the same always afloat to the order of the said merchants or their agents alongside any store craft steamer depot ship wharf or arsenal . . . . The steamer to be discharged at the rate of 200 tons per weather working day (Sundays and holidays excepted). Time for delivery to count when steamer is ready to discharge. For all hours occupied beyond the said hours for . . . . discharging the steamer to be paid demurrage at the rate of sixteen shillings and eightpence per hour."

The *Albireo* duly proceeded to Port Vendres with a cargo of coal, and arrived there at 2 P.M. on December 19, 1895. She was then physically ready in all respects to discharge her cargo,

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and her captain gave written notice to the charterers' agent of his readiness to unload. The customary place at Port Vendres for the discharge of a vessel such as the *Albireo* was the Quai de la Douane; but this place was not available when the vessel arrived, as it was reserved by the French Government for some expected transports. Discharge by lighters is not customary at Port Vendres, and it was not until 1 P.M. on December 24, that the *Albireo* was able to be moored to the Quai de la Douane and that the unloading commenced.

The plaintiffs now claimed from the defendants the sum of 57*l.* 10*s.* in respect of sixty-nine hours' demurrage.

J. E. Bankes, for the plaintiffs. The lay-days began to run from the time the vessel arrived at the port on December 19. This is not a case in which there was any berth named by the charterparty or by the charterers in accordance with power reserved to them by the charterparty. That was the case in *Tharsis Sulphur and Copper Co.* v. *Morel Brothers* (1), and there the Court of Appeal, overruling *The Carisbrook* (2), held that the lay-days did not begin to run until the vessel was berthed. It is admitted that the words in the charterparty "as usual and customary" refer to the mode and not to the time and place of delivery: *Tapscott* v. *Balfour*. (3) Secondly, the word "ready" must be given its ordinary meaning: *Monsen* v. *Macfarlane*. (4) There is nothing in the charterparty to shew that "ready" means "ready at a particular place." The vessel on arriving at the port of Vendres was ready to unload, and there is nothing in the charterparty which prevented her from being then an arrived ship and ready to discharge her cargo.

Scrutton, for the defendants. The case is really covered by authority, since *The Carisbrook* (2), in which the charterparty was practically identical with that in this case, has been expressly overruled by *Tharsis Sulphur and Copper Co.* v. *Morel Brothers*. (1)

If the charterers have the right to designate the place in the

(1) [1891] 2 Q. B. 647.
(2) (1890) 15 P. D. 98.
(3) (1872) L. R. 8 C. P. 46,
(4) [1895] 2 Q. B. 562.

port where the cargo is to be discharged, the ship is not an arrived ship until she is at that place; and if no place is designated, she is not an arrived ship until she arrives at the usual place of discharge in that port.

The authorities on the subject of what is an arrived ship fall into three classes.

Where the place named in the charterparty is a port and there is nothing more, the lay-days begin to run when the ship is at the usual place of discharge in that port, or (if there is more than one usual place of discharge) at that place of discharge which the charterers designate: *The Felix*. (1) Where, however, the place named in the charterparty is a dock, the lay-days commence to run as soon as the ship is in the dock, and it is not necessary in order that she should be an arrived ship that she should be at any particular place in the dock: *Tapscott* v. *Balfour*. (2) The third case is where the place named in the charterparty is a particular berth, which is either expressly designated or is to be named by the charterer. In that case it is at last decided, after some conflict of authorities, that the lay-days do not commence to run until the ship reaches the named berth: *Murphy* v. *Coffin*. (3)

Monsen v. *Macfarlane* (4) falls under the second class, as the colliery guaranty which was incorporated in the charterparty provided for the time commencing when the ship was "ready in dock," and therefore the lay-days began to run as soon as she got into the dock. [He also cited *Brereton* v. *Chapman* (5); *Kell* v. *Anderson* (6); *Nelson* v. *Dahl* (7); *Nielsen* v. *Wait*. (8)]

COLLINS J. In this case I have come to the conclusion on the authorities that my judgment must be for the charterers. The material words of the charterparty are that the ship when loaded with her cargo shall "forthwith proceed to Port Vendres and as usual and customary deliver the same always afloat to the order of the said merchants or their agents alongside any

(1) (1868) L. R. 2 A. & E. 273.
(2) L. R. 8 C. P. 46.
(3) (1883) 12 Q. B. D. 87.
(4) [1895] 2 Q. B. 562.
(5) (1831) 7 Bing. 559.
(6) (1842) 10 M. & W. 498.
(7) (1879) 12 Ch. D. 568; (1881) 6 App. Cas. 38.
(8) (1885) 16 Q. B. D. 67.

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Collins J.

store craft steamer depot ship wharf or arsenal. . . . The steamer to be discharged at the rate of 200 tons per weather working day . . . . Time for delivery to count when steamer is ready to discharge."

It is admitted that the words "deliver the same always afloat to the order of the said merchants or their agents alongside any store, &c.," gave to the charterers the option of designating any particular wharf at which the vessel should be discharged. That is in effect to read into the charterparty the words "as ordered." If I do put in those words, the case seems absolutely covered by authority, for the charterparty then becomes identical with that in *The Carisbrook*. (1) There the charterparty provided that the vessel should proceed to Odessa or so near thereunto as she might safely get, and deliver the cargo to the charterers "alongside any safe wharf store craft steamer depot ship or arsenal as ordered by receiver." In that case Butt J. held that the time for discharging commenced when the ship arrived at the port, and not when she arrived alongside the quay to which she was ordered by her charterers. That decision was, however, expressly overruled in *Tharsis Sulphur and Copper Co.* v. *Morel Brothers*. (2) The effect of that case is, that a provision in a charterparty dealing with the delivery of the cargo at a particular place in the port to be named by the charterer extends the voyage up to that particular place, and bars the shipowner from saying that his vessel is an arrived ship until she has reached the place in the port that has been designated by the charterer.

It has been contended that in this case the steamer was "ready to discharge" when she reached Port Vendres, and that under the charterparty the time for delivery began to run from her arrival at that port. But the answer to that is, that she could not be ready to discharge until she was an arrived ship; and in accordance with the authorities, she was not an arrived ship under this charterparty until she was at the usual place of discharge in the port. The authorities cited by Mr. Scrutton are clear to shew that, if by a charterparty it is agreed that a ship shall go to a port and there unload, she must unless other-

(1) 15 P. D. 98. (2) [1891] 2 Q. B. 647.

wise ordered go to the customary place of discharge in that port. This case, therefore, comes within the rule (which is amply supported by authority) dealing with the arrival of ships at ports, and does not fall within those rules which deal with cases where the ship is directed to some smaller place within the port, such as a dock.

I have no doubt, therefore, that my judgment must be for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *King, Wigg & Co., for Shortt, Fenwicke & Grey, Newcastle-upon-Tyne.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

JOHN POTTER & CO. *v.* BURRELL & SON.

Ship—Charterparty—Obligation of Charterers to Load—Successive Ships—Approximate Dates of Arrival at Loading Port—Damages for Detention of Ship—Perils of the Sea Clause—Towage Clause—Delay—Salvage Service—Allowable Deviation.

By a charterparty shipowners agreed with charterers to provide for the successive arrival at a foreign loading port of five steamers between August and December inclusive, "as nearly as possible a steamer a month," at approximate dates afterwards agreed upon; and the charterers agreed to present cargo within twenty-four hours after notice of each ship's readiness to receive it. The charterparty contained a clause excepting perils of the sea, and also a clause giving each steamer liberty to tow and be towed and assist vessels in all situations, and providing that salvages should be for the benefit of owners. Owing to perils of the sea, ship No. 2 arrived about a fortnight late; and while she was loading ship No. 3 arrived punctually. There was not sufficient labour to load the two ships at once, and ship No. 3 had to wait for her cargo till the loading of ship No. 2 was completed:—

Held, upon the construction of the charterparty, that the shipowners were entitled to damages for the detention of ship No. 3.

Ship No. 4 arrived three weeks late at her Australian port owing to her having while on her voyage to that port fallen in with a disabled ship and towed her to Mauritius as a salvage service; such towage was out of the course of the voyage, and took three weeks to effect. The arbitrator having

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found that the delay caused by this towing was not so great as to frustrate the object of the adventure:—

Held, that the salvage service was an allowable deviation within the contract between the shipowners and the charterers; and that notwithstanding the delay in the arrival of the ship, the charterers were bound to present cargo within twenty-four hours after notice, and not having done so were liable to pay demurrage to the shipowners.

APPEAL from a decision of a Divisional Court consisting of Day and Lawrance JJ. upon questions submitted to them in a special case stated by the arbitrator, to whom all questions in dispute between the parties in this action had been referred.

These questions arose upon the construction of a charterparty, and two only of them call for a report.

By a charterparty dated May 5, 1894, it was agreed that the defendants, Burrell & Son, who were shipowners, should provide the plaintiffs, John Potter & Co., who are hereinafter called the charterers, with five steamers at a certain rate of freight, and that each steamer should with all convenient speed after the discharge of her outward cargo proceed direct in ballast to a port in New Caledonia as ordered by charterers, and there, always afloat, load part cargo of nickel ore, afterwards proceeding direct in a certain order to any three Australian or New Zealand ports as ordered by charterers or their agents, and there load at such usual docks, wharves, piers, or places therein where the vessel could safely lie afloat, any sort of lawful merchandize, including wool, to complete her full cargo, as the charterers or their agents should tender alongside for shipment; and being so loaded should proceed to any two ports in the United Kingdom or the Continent between Bordeaux and Hamburg, as ordered by charterers, to deliver her Australian or New Zealand cargo, and thence to Havre or Glasgow, as ordered, to deliver her New Caledonian cargo. The charterparty contained, in clause No. 6, the usual provision excepting perils of the sea or of steam navigation; and its other material clauses were as follows:—

By clause 16 the captain, on arriving at loading port in New Caledonia, was to advise his agents the quantity of ore he was instructed by charterers or their agents to receive; but

should the vessel be ordered to Noumea, if charterers' agents should be unable to furnish there the proper quantity of ore, the steamer should, if ordered by charterers' agents, proceed to Kuana to make up the quantity, and the extra charges were to be payable by charterers' agents.

Clause 19: "As regards cargo to be shipped in New Caledonia, the same shall be presented upon lighters, barges and other vessels, which shall commence to come alongside the steamship within 24 hours after receipt of notice by charterers' agents that vessel is ready to receive cargo. Charterers' agents shall furnish each weather working day the quantities steamer can take (Sundays, legal and Custom House holidays excepted), but not exceeding 800 tons per day. The steamer shall take the ore from the lighters, barges and other vessels, as fast as she can receive."

Clause 26: "Steamer to have liberty to tow and be towed and assist vessels in all situations, and salvages procured to be for benefit of owners."

Clause 35: "Under this charter it is agreed that Burrell & Son are to provide John Potter & Co. with five steamers of 2000 to 3200 tons net register, size at Burrell & Son's option, to load between August and early December inclusive, at times, to be in good time mutually arranged, but as nearly as possible a steamer a month."

By clause 36 it was mutually agreed that any profit or loss upon the charter should be equally divided between owners and charterers.

The shipowners duly provided five vessels, the *Strathtay*, the *Strathairly*, the *Strathnairn*, the *Strathord*, and the *Strathness*; and the dates at which the five vessels were to be due in New Caledonia (which is an island to the eastward of Australia) were mutually arranged between the parties; and it was also arranged that the vessels should arrive at Noumea, which was the principal port of the island. This arrangement was evidenced by a letter from the owners to the charterers dated July 31, 1894, wherein it was stated that the dates at which the boats would be due at Noumea were as follows: the *Strathtay* on August 18, the *Strathairly* on September 23,

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the *Strathnairn* on October 10, the *Strathord* on October 23, and the *Strathness* on November 7.

There was no evidence other than the charter and this letter that the owners in any way warranted that their steamers should arrive out by the above-named dates.

The *Strathnairn* arrived at Noumea on October 12, 1894, which was approximately the date contemplated for her arrival; and notice that she was ready to receive cargo was given to the charterers' agents on the same day; but no cargo was presented alongside or tendered to her until October 24.

As found by the arbitrator, the reason for the delay in tendering cargo to the *Strathnairn* was that the preceding ship, the *Strathairly*, which was due at Noumea on or about September 23, having met with heavy weather, did not arrive until October 8 or 9, when she at once commenced to load. She loaded with proper despatch; but as the resources of Noumea as regards labour were not sufficient to load more than one steamer at a time, she was still loading when the *Strathnairn* arrived, and her loading was not complete until October 23, when she sailed.

The first question was whether, under these circumstances, the shipowners were entitled to recover from the charterers any damages for the detention of the *Strathnairn* at Noumea; and the arbitrator decided, subject to the opinion of the Court, that, having regard to the exceptions in the charter, there was no breach of duty or breach of contract on the part of the owners as regards the arrival of the *Strathairly* in Noumea, that they were not responsible for her late arrival, and that they were, therefore, entitled either to have the *Strathnairn* loaded without delay, or to receive compensation for her detention if she were not so loaded.

The second question was whether, under the following circumstances, the shipowners were entitled to recover from the charterers any damages for the detention of the *Strathord* in New Zealand. The *Strathord* left Glasgow for Noumea, viâ (by arrangement with the charterers) Sydney, in sufficient time to arrive at Noumea about October 23, where she was due according to arrangement. While on her voyage to Sydney,

and in latitude 41½° south longitude 65° east, she fell in with a steamer called the *Buteshire* disabled and in distress, and, at the request of the master of the *Buteshire*, the *Strathord* towed her to Mauritius as a salvage service, her owners receiving a large sum of money as salvage. Owing to this service the voyage of the *Strathord* was prolonged by about three weeks, Mauritius being out of the course to Australia; but the arbitrator found as a fact that, if the *Strathord* was justified in rendering the required assistance, the course taken was a reasonable and proper one, and did not involve more delay than would have been involved in the towage of the *Buteshire* to an Australian port. The *Strathord* in consequence arrived over three weeks late at Noumea, where she was duly loaded with her ore. One result of this delay was that an agreement entered into between the charterers' and an Australian firm for loading the steamer in Australia was cancelled, and having lost this employment the *Strathord* proceeded by order to Bluff, a New Zealand port, where she arrived on December 13. Notice that she was ready to receive cargo was given to the charterers' agents on the same day, but no cargo was tendered to her until January 3. The charterers contended that under these circumstances they were not bound to load in accordance with the terms of the charter, but merely to load within a reasonable time, and that, having done the best they could, they were not liable for the delay. But the arbitrator found as a fact that the services rendered by the *Strathord* to the *Buteshire* were not such as to frustrate the object of the adventure as between the charterers and owners; that the charter continued in force, and the charterers were bound to load in New Zealand in accordance with it; and he awarded the owners a sum of money as demurrage or damages for the detention of the *Strathord* in New Zealand.

The special case was heard by the Divisional Court on August 7, and the learned judges held that the award of the arbitrator was correct in every respect.

The charterers appealed.

Nov. 6. *Cohen, Q.C.*, and *Scrutton*, for the appellants. Upon

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the first question, the provisions and clauses of this charterparty must be construed and reconciled in a businesslike way; and the conditions and labour resources of the port of Noumea must be taken to have been known to the parties, and to have formed the basis of the contract: *Hudson* v. *Ede*. (1) What the charterers undertook to do was to load a line of steamers arriving "in good time," and "as nearly as possible a steamer a month." The risk of providing labour for one ship at a time was all that was contemplated by the contracting parties, and this is shewn by the provisions of the charter—in particular by clause 35, and by the terms of the letter of July 31, 1894. The delay in loading the *Strathnairn* was caused by the failure of the *Strathairly* to arrive and load at the proper time. Had she done so, her loading would have been completed before the arrival of the *Strathnairn*; the *Strathnairn* would have loaded in due course, and no claims for demurrage could have arisen.

Under these circumstances the charterers are not liable to any claim for demurrage on the part of the shipowners: *Tharsis Sulphur and Copper Co.* v. *Morel Brothers* (2); *Tapscott* v. *Balfour* (3); *Jackson* v. *Union Marine Insurance Co.* (4)

Again, clause 19 did not amount to an absolute contract by the charterers to tender cargo within twenty-four hours after notice of readiness to receive it. Looking at the charterparty as a whole, there was a condition precedent to the performance by the charterers of their contract to load, namely, that the ships should arrive at certain intervals, and should substantially keep their time; and unless they do so, the charterers are not bound to deliver cargo within the time specified, and are not liable in damages for failure to do so. The charterers do not put the case as being one of breach of contract, but as one involving the non-fulfilment of a condition precedent.

Then as to the *Strathord*. It is true that by clause 26 the steamers are to have liberty to tow and assist vessels, and that salvages procured are to be for the benefit of the shipowners. But this is a clause in general terms which taken literally would allow deviation to any extent whatever, and it must accordingly

(1) (1868) L. R. 3 Q. B. 412.
(2) [1891] 2 Q. B. 647.
(3) (1872) L. R. 8 C. P. 46.
(4) (1874) L. R. 10 C. P. 125.

be construed as subsidiary to the main object of the charterparty, and some limit must be put upon its operation: *Stuart* v. *British and African Steam Navigation Co.* (1) For this purpose the main object of the adventure was the arrival of the ships at Noumea in proper time for the loading, and no salvage service ought to have been undertaken which would defeat that object by delaying the arrival of the steamers by three weeks. Moreover, where one of the parties to a charterparty of this kind voluntarily and for his own benefit chooses to do an act which prevents the fulfilment of the contract by the other party, he cannot claim damages for the failure occasioned by his own act.

Bigham, Q.C., and *J. E. Bankes*, for the respondents, the shipowners. The dates arranged for the arrival of the steamers at Noumea were not absolutely fixed dates, but were approximate dates; and it was owing to no default or breach of contract upon the part of the shipowners that the *Strathairly* arrived after her time. It was entirely owing to the bad weather she encountered, and, as perils of the sea are excepted from the charterparty by clause 6, she must be treated as having arrived in due time within the meaning of the contract. No condition precedent can be spelt out of the charterparty: clause 19 is absolute in terms, and there is nothing to relieve the charterers from the obligation imposed upon them by that clause of loading within twenty-four hours after notice. The finding of the arbitrator as to the *Strathnairn* was accordingly quite right, and the shipowners are entitled to the damages he awarded.

As to the *Strathord*, she merely did what she was entitled to do under clause 26 of the charter. The shipowners had liberty given to them in express terms to perform salvage services for their own benefit; and the arbitrator has found that the services rendered were reasonable and proper, and did not involve more delay than towing the *Buteshire* to an Australian port would have occasioned; and, further, that the services were not such as to frustrate the object of the adventure. How can it, therefore, be said that this service went beyond the limit which should be

(1) (1875) 2 Asp. Marine Cases (N.S.) 497; 32 L. T. 257.

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placed upon a clause of this character, or that the deviation was not a reasonable one?

Cohen, Q.C., in reply.

LINDLEY L.J. The questions raised in this appeal turn entirely upon the construction of the charterparty. [The Lord Justice then referred to the terms of the charterparty, and continued:—]

Now, I must observe that when the port in New Caledonia is mentioned, nothing is said about loading "at usual docks, wharves, piers, or places," and the reason for this probably is that the ports in New Caledonia are not provided with docks, wharves, piers, and places such as exist in the ports in Australia where the ships are to call. It also appears from the charterparty that, besides Noumea, there is at least one other port in New Caledonia—namely, Kuana—which is named in clause 16, and it was uncertain, at the date of this charter, to which port these ships were to go, although it was arranged afterwards they should go to Noumea.

Clause 35 is unquestionably an important clause, and it is material to consider what is meant by the expression "in good time to be mutually arranged, but as nearly as possible a steamer a month." I think the words "as nearly as possible" shew that the actual date which may be mutually arranged is not to be taken as a fixed date which cannot be departed from; for the expression "as nearly as possible a steamer a month" throws us back on clauses 6 and 26. Clause 6 is the perils of the sea clause. So the date is not a fixed date, but a flexible date. Clause 26, again, is the towage clause, by which the steamers have liberty to tow and be towed and assist vessels in all situations, and salvages procured are to be for benefit of owners. Therefore, towing is contemplated. What amount of towing is contemplated is another question. Of course, an unreasonable towage service is not contemplated, and, I take it, no towing service which would defeat the objects of the parties to the contract is contemplated. But any towage which is consistent with the attainment of the objects is contemplated. All towage involves delay. You cannot tow ships and go at the

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pace you can if you are not towing. Therefore, you must read these clauses together; and, to my mind, it is most important to ascertain exactly what it is these parties are to do. Now let us consider clause 19 as to the loading at New Caledonia. The ships were not to take a full cargo: they were to take a partial cargo of nickel, and to fill up with wool, or anything else they liked, coming home. The meaning of clause 19, as to the cargo to be shipped in New Caledonia, is that if a vessel arrives at a time which is consistent with this charterparty the charterers are to send the nickel ore in lighters, barges, and other vessels alongside the steamship within twenty-four hours after notice. That is what the charterers undertake to do; and unless they can shew that, by the non-performance of some condition or by some breach of contract on the part of the owners, they are discharged from the obligation thus imposed upon them, they must carry out that undertaking. They take the risk of that. Now, what happened? Let us take the first point raised by this appeal, with reference to the *Strathnairn*. It was arranged that the ships should arrive at certain specified dates. The *Strathnairn* was to arrive on October 10; she arrived on the 12th. No question arises upon that, as it is a reasonably approximate date. Why, then, was not she loaded by the charterers pursuant to the obligation imposed upon them by clause 19? Because the preceding ship, the *Strathairly*, had arrived late, and there was not labour enough at Noumea to load both ships at once. Why, then, was the *Strathairly* late? Not by reason of any fault of the owners, but by reason of perils of the sea. The truth is, she was not late according to the true meaning of this contract—she had arrived in time. As I have pointed out, September 23, the time named for her arrival, was not a fixed date, but was an approximate date "as nearly as possible" consistent with perils of the sea. There was no breach of contract, nor was there any breach or non-performance of any condition in her being late. She was there as contemplated by the parties to this charter; and there was, therefore, nothing to justify the charterers in saying they ought not to pay for the delay in loading the *Strathnairn*. I have not the slightest doubt that, according to the true construction

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of this charterparty, the risk of finding labour for loading two ships, if they should happen to overlap, was on the charterers; and I cannot read clause 19 as exonerating them in any way from finding lighters and labour to ship the ore. That is made plainer, to my mind, by clause 16, which provides that if the charterers name Noumea and cannot fill up with ore there, they can order the ship to another port in New Caledonia, upon certain terms there mentioned. To my mind, that is a further reason for holding that the risk of finding labour is on the charterers. Clause 19, in my opinion, makes their appeal upon that point untenable, for there is no breach of contract nor any non-fulfilment of a condition precedent. Whether the contention on the part of the charterers would not be right if these dates had been absolutely fixed, and they had been the cardinal dates, we need not pause to consider. The dates are approximate, and there is nothing further I need add upon that.

Now I will take the next case, that of the *Strathord*, which is not quite so easy. The appeal as to that, again, appears to me also to turn simply upon the true construction of this charterparty. What happened was this. The *Strathord* was going out to New Caledonia viâ Sydney. Before she got to Sydney she fell in with a ship in distress, the *Buteshire*, and she towed her back, as I understand it, to Mauritius. That caused a delay of about three weeks; but the arbitrator has found as a fact that such delay was not greater than would have been caused if the *Strathord* had towed the *Buteshire* on to Australia, which was in the course of her voyage. Under these circumstances we are asked to say that this towage caused such a delay as to be inconsistent with the attainment of the object of this charter. I cannot say anything of the sort. If the *Strathord* had towed the *Buteshire* up to the North Pole it probably would have been so; but she towed her back to Mauritius. It was a deviation, of course; but, under such a charter as this, which allows towing, a deviation, unless it is so great as to be inconsistent with the contract, is an allowable deviation; and, having regard to the facts found in this case, it seems to me that we cannot possibly hold that the deviation which actually took place in conse-

quence of this towage was an unallowable one. The delay was not so great—and the arbitrator finds that—as to defeat the object of the parties. If so, there was no breach of contract by that towage, and there was no non-performance of any condition precedent within the meaning of this contract. That is the answer to that part of the case.

In my opinion the appeal fails on both these points.

A. L. SMITH L.J. Only two questions arise in this case.

The first is as to damages claimed by the owners of the *Strathnairn* against the charterers for detention of their ship at the port of loading: and the second is, as to damages claimed by the same shipowners against the same charterers in reference to another ship—the *Strathord*—also for detention at the port of loading. The questions arise upon a charterparty dated May 5, 1894, between the shipowners and charterers. Now, although the charterers are the plaintiffs, I shall treat this case as if in reality it was an action by shipowner against charterer for damages for not loading the ship in pursuance of the charter.

The clause upon which the shipowners have founded their claim is clause 19 of the charter, by which the charterers have bound themselves in these terms. [The Lord Justice then read that clause, and continued:—]

The *Strathnairn* arrived at Noumea, her port of loading, in due course. No complaint is made as to the time of her arrival; but the charterers presented no cargo within twenty-four hours after notice of the readiness of the vessel to receive her cargo had been given, and it is for the delay which then occurred that the first claim of the shipowners is made. The arbitrator has awarded damages—or it may be called demurrage—for this delay, and against this the charterers appeal.

Now, what is the argument by which the charterers seek to get rid of clause 19, which, as I read it, is an absolute undertaking by the charterers that within twenty-four hours after receipt of notice that the vessel is ready to receive cargo, cargo shall be presented alongside the ship? It is said first of all that this clause is not an absolute contract by the charterers to provide freight within twenty-four hours after receipt of notice

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that a vessel was ready to receive cargo. That was said; but the clause is absolute in terms, and no argument was addressed to the Court to shew why it should not be treated as an absolute contract. The next point taken was this. It was said that, looking at the whole charterparty, no demurrage was to be paid by the charterers for not loading the ship, and that the clause about sharing profits shewed this. It was also said that if it happened, by reason of perils of the sea or what not, that two ships arrived at the same time, and one was already in process of loading, it was a condition precedent that no obligation should be imposed upon the charterers to load the second ship. I cannot read this charter as containing any such exceptions to the absolute contract which is found in clause 19.

It was then contended by Mr. Cohen, that upon the true reading of clause 35 itself there is a condition precedent that if any two of the vessels happen to arrive so as to overlap each other, then the obligation to pay demurrage, which would otherwise apply, is done away with. But has a clause of this description ever been read as constituting a condition precedent to the performance of the other clauses of a charter, one of which, as I have already pointed out, is absolute in its terms? Under this charter, which was made in May, 1894, it is agreed that the shipowners are to provide the charterers with "five steamers . . . . to load between August and early December inclusive"—so far there is no express stipulation that the ships are to be there one a month, but I will read on: "at times, to be in good time mutually arranged, but as nearly as possible a steamer a month." "As nearly as possible" with permissible sea perils intervening, that is said to constitute a condition precedent that there shall be a steamer once a month, and that if they overlap it does away with the right of the shipowners against the charterers to claim damages for detention. Afterwards, pursuant to that term of the contract, on July 31, 1894, the parties came to a mutual arrangement as to how the ships were to go out. [The Lord Justice then read the letter of July 31, 1894, and continued:—]

Now, where is to be found the condition precedent, that if these ships overlap, the contract with regard to loading shall be

at an end? As a matter of fact, nothing of the sort is to be found in the contract.

The *Strathnairn* arrived at Noumea on October 12, shortly after the time by which, according to the contract, she was to be there, and no complaint is made of the time of her arrival. She was ready in due course to take her cargo on board, and due notice was given that she was ready to load. The charterers did not load, because, as it is said, they could not load two ships at the same time. Take it that it was so. How does that cancel the express contract in clause 19—that the charterers will load within twenty-four hours? The shipowners were not guilty of any breach of contract. They themselves had done nothing which could hinder and prevent the charterers from carrying out their contract, and I cannot see how the mere fact of the *Strathairly* getting there late cancelled that express contract in the charter. If a ship gets there in due time, which the *Strathnairn* did, and notice is given within twenty-four hours, the charterers are bound to provide a cargo for that ship.

Upon these grounds, it seems to me that the arbitrator was right in finding that the shipowners were entitled to damages for delay in loading the *Strathnairn* at Noumea, and I think the appeal fails upon this point.

I now come to the *Strathord*, and this is how I think the case really stands with regard to her. [The Lord Justice then stated the facts as to the *Strathord*, and continued:—]

In the result, the charterers kept the ship waiting from December 13 to January 3 before they loaded her with wool cargo; and the shipowners claim damages for this delay, contending that they had not broken any contract on their part, that they had express liberty under the towage clause to perform salvage services for their own benefit, and that it had been found by the arbitrator that what they had done was perfectly reasonable. To that Mr. Cohen replied on behalf of the charterers: "It is true that there is a clause in the charterparty which allows the shipowners to render salvage services, but some limit must be put upon the extent of that service. The clause cannot be construed as giving liberty to render such services as would cause the ship to arrive at the port of

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loading six, twelve, or fifteen months or two years after the stipulated period." With that I agree. In support of this contention, Mr. Cohen cited the judgment of Bramwell B. in *Stuart* v. *British and African Steam Navigation Co.* (1) In that case, Bramwell B. said to Mr. Benjamin, who was arguing, "I wish you could tell us what that limit must be." Mr. Benjamin did not define it; and I am not going to try to give any fixed limit. But what Bramwell B. did say was that that case was not over, but well within the line. What the arbitrator has found as a fact in this case is, that the time which was occupied by this salvage service did not frustrate the object of the adventure between the shipowner and the charterer. By the contract the shipowner had the right to perform these services. If the shipowner performs this service as he is entitled to do and in such a way as not to frustrate the object of the adventure between charterer and shipowner, why may not that be said to at any rate be within the limit? It might well be, that if the salvage service occupied such a time as to frustrate the object of the adventure, it would be outside the limit; and I think it would be, but I cannot find in this case that these salvage services have exceeded the limit which must be imposed upon the clause in question. It is said by Mr. Cohen that if a person for his own benefit voluntarily does an act so that a charterparty cannot be carried out, he cannot claim demurrage. With submission, that begs the question, which is—what was the contract between the parties? If the shipowner has only done that which the contract has in express terms permitted him to do, and his doing it has not frustrated the object of the adventure, why is any other right which he has under the contract to be taken away? Why is he to lose the right to claim damages if the other party does not perform his part of the contract? I do not see why that right should be taken away, and in my judgment it is not.

It seems to me that on both these points the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Parker, Garrett & Holman; Botterell & Roche.*

(1) 32 L. T. 261.

W. W. K.

[IN THE COURT OF APPEAL.]

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ROBERTS *v.* SECURITY COMPANY, LIMITED.

Insurance against Burglary—Execution of Policy—Retaining Possession of Policy—Completed Contract—Recital—Waiver of Prepayment of Premium.

A proposal for an insurance of goods against loss by burglary having been made by the plaintiff to the defendant company on December 14, 1895, the seal of the company was affixed to a policy in conformity with the proposal at a meeting of the directors upon December 27, and the policy was signed by two directors of the company and their secretary. The policy recited that a premium had been paid for an insurance against loss by burglary from December 14, 1895, to January 1, 1897, and purported to insure the plaintiff's goods accordingly. It contained a provision that no insurance by way of renewal or otherwise should be held to be effected until the premium due thereon should have been paid. Upon the night of December 26, or early in the morning of December 27, a loss of goods included in the policy by burglary had taken place. The policy remained in the hands of the company, and nothing was paid by way of premium:—

Held, that the policy constituted a completed contract of insurance; that by the recital therein the defendants had waived the condition for prepayment of the premium; and therefore that the policy had attached.

APPEAL by the defendants from the judgment of a Divisional Court (Grantham and Wright JJ.) affirming the decision of the judge of the Leeds County Court.

The action was brought upon a policy of insurance against loss by burglary or housebreaking.

The plaintiff on December 14, 1895, signed and sent to the defendants a proposal for an insurance to the amount of 167*l.* upon furniture and other chattels in a dwelling-house against loss by burglary or housebreaking. The proposal, which was made upon a printed form, stated that the proposer agreed to accept a policy subject to the usual conditions prescribed by the company and indorsed on that policy. It was stated by the form that the policy was renewable on the 1st of the month, and the premium for the odd time over twelve months was to be added to the first year's premium; and that no insurance would be considered in force until the premium had been paid.

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The proposal stated that the annual premium was to be 9*s.* 9*d.*, and the first premium 9*s.* 11*d.*, 2*d.* being the addition in respect of the odd time.

On December 18 a document called a protection-note was signed by the defendants' agent in which it was stated that the plaintiff, having made a proposal to the company for insurance against loss arising from burglary or housebreaking for the sum of 167*l.* on property described in the proposal, and having paid to the agent the sum of £—— (the blank not being filled up), was thereby declared to be provisionally protected against that risk (subject to the conditions contained in and indorsed on the form of policy used by the company) for seven days from the date thereof, or until the proposal should be in the meantime rejected. The protection-note contained a note that, in the event of the proposal being declined, the deposit paid would be refunded less the proportion of the premium for the period covered. The protection-note was sent by the defendants' agent to the plaintiff in a letter stating that a policy would be sent in due course. No sum of money ever was paid by way of premium. On the night of December 26, or early in the morning of December 27, a burglary was committed on the plaintiff's premises and a loss of some of the property alleged by the plaintiff to be insured was thereby occasioned. Upon December 27, at a meeting of directors of the defendants' company, who were then ignorant of the fact that the loss had taken place, the seal of the company was affixed to a policy of insurance in conformity with the proposal; and the policy was signed by two of the directors of the company and their secretary. The policy recited that the plaintiff had made a proposal dated December 14, 1895, to the company for an assurance of the property thereinafter described for the sum thereinafter appearing, and had paid to the company the sum called in the margin thereof the first premium, being the premium required by the company for the assurance of the said property from noon of December 14, 1895, to noon of January 1, 1897, and purported to insure the property described accordingly. In the margin were notes stating that 9*s.* 11*d.* was the sum paid for the first premium,

that the renewal date was January 1, annually, and that the renewal premium was 9*s.* 9*d.* It was provided by the policy that no assurance by way of renewal or otherwise should be held to be effected until the premium due thereon should have been paid. The policy was not delivered to the plaintiff, but remained at the company's office. The plaintiff stated in evidence that he had never paid the premium, because he had never been asked for it. The defendants denied liability on the ground that, when the burglary took place, no contract for insurance had been concluded.

The county court judge gave judgment for the plaintiff.

Channell, Q.C., and *G. M. Cohen*, for the defendants. It is contended that, when the loss took place, the matter had not gone beyond the stage of negotiation, and no contract for insurance had been concluded. In the proposal, the covering-note, and ultimately in the policy itself, it was stated that no insurance was to be deemed to be effected until the premium was paid. The policy was sealed and signed in order that it might be handed over against payment of the premium, and until that was done, there was no effective execution of it, or only a conditional execution. Where acts are intended to be concurrent, one must often in fact be done first, but it is not intended to be legally effective until the other is done. No estoppel by deed could be created by the recitals in the policy, for the policy never became an effective instrument. This instrument is not a deed within the doctrine of estoppel by deed. A company can only contract under seal, but it does not follow that every instrument of contract by them is a deed for the purpose of the technical doctrine of estoppel by deed. This case comes within the authority of *Canning* v. *Farquhar*. (1) The case of *Xenos* v. *Wickham* (2) was that of a policy of marine insurance and depended upon the custom which prevails in respect of such insurances as between the insurance companies and insurance brokers for the company to give credit to the broker for the premium. That case has no application to the case of fire or other insurances not marine. Assuming that

(1) (1886) 16 Q. B. D. 727. (2) (1867) L. R. 2 H. L. 296.

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the policy was executed unconditionally, and there was a concluded contract for insurance, it was a term of it that there should be no insurance until the premium was paid.

Longstaffe, for the plaintiff, was not called upon.

LORD ESHER M.R. In my opinion this appeal fails. In this case there was a proposal for insurance which was accepted. It does not appear to me material to consider what would have been the effect of the proposal and the acceptance of it, if the matter had rested there. The transaction had gone beyond that stage; for a policy was executed under the seal of the company; and the effect of that is what we have to consider. The question raised is whether an insurance was effected by the sealing and signing of the policy, or the execution of the policy was only intended to be conditional. I do not see any evidence of a conditional delivery, or that this document was intended not to be a policy unless certain conditions were fulfilled. The document states that in witness thereof the company have caused their common seal to be affixed, and that the undersigned, being two directors and the secretary of the company, have thereunto set their hands. It is urged that the document was still in the hands of the company or of their officers on their behalf. There is no suggestion that it was delivered to any one as an escrow. If it was in the hands of the company itself, it could not be delivered as an escrow. The proper inference appears to me to be that the directors simply executed the policy, and the fact that it remained in their hands, or I should suppose in the hands of their secretary on their behalf, does not seem to me material. The company might have delivered the policy to some one to hold as an escrow, but they did not and never intended to do so. The policy was in my opinion executed by the company and was not executed conditionally. Therefore we must take it that there is an existing policy, and all we have to do is to construe it. It is a contract to insure the plaintiff against loss of the property insured by burglary or housebreaking from December 14, 1895, to January 1, 1897, and it recites that the assured has paid the premium for that insurance. It was said that that

recital was incorrect, and that the premium so stated to have been paid never was in fact paid. I do not think the defendants are for the present purpose at liberty to shew that in contradiction of the terms of their own deed. They have treated the premium as paid, and, if it has not been paid, I think they have thereby waived the previous payment as a condition of the existence of an insurance. With regard to the alleged custom in the case of marine insurance, which has been referred to, it is rather a practice than a custom properly so called. It is not confined to any particular place, but is a general practice for the convenience of trade. If, as I think, the company have by the terms of the policy which they have executed waived the previous payment of the premium as a condition of the insurance, what is the result? It appears to me that they may claim payment of the premium at any time, or, if there is a loss before it is paid, it may be deducted from the amount payable in respect of that loss, but they cannot, after they have executed a deed in these terms, get rid of liability merely on the ground that the premium has not been previously paid. For these reasons I think the appeal must be dismissed.

LOPES L.J. I also think that the judgment of the Divisional Court was right, and must be affirmed. I do not think it necessary to consider the effect of the proposal or of the covering-note. For their effect was, as it appears to me, at an end when the policy was executed. The question we have to consider is whether there was a concluded agreement for insurance, or the matter had not gone beyond the stage of negotiation. In my opinion the policy, being duly executed as it was by the sealing and signature by the directors and secretary of the company, constituted a concluded agreement. Therefore it is not material to go back and consider the statement in the proposal and covering-note that no insurance is to attach until payment of the premium. One of the recitals in the policy contains a positive statement that the premium has been paid, but the company nevertheless seek to contradict that statement in their own deed. I think they are estopped for

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this purpose by their own statement, or, if not, properly speaking, estopped, there is evidence of a waiver by them of the term as to previous payment of the premium. It seems to me that the policy executed as it was is clear proof of a concluded agreement, and in my opinion if, the day after its being so executed, the plaintiff had tendered the premium and demanded the policy, there would have been no answer to his demand.

RIGBY L.J. I am of the same opinion. The policy of insurance, which was I think duly executed by affixing the seal of the company thereto and the signatures of two directors and the secretary, treats the insurance intended to be thereby effected as beginning on December 14 then last past. It states in effect that the ordinary annual premium to be paid is 9*s.* 9*d.*, but that a special premium of 9*s.* 11*d.* was paid in respect of the insurance for the first year with the addition of so much of the then current year as had elapsed, or would elapse, after noon of December 14. There is, therefore, an extra premium of 2*d.* in respect of that additional period which elapsed partly before and partly after the execution of the policy. I cannot hesitate to say that the company, by what they did, at least waived prepayment of the 2*d.*, which is the amount of the premium applicable to that period. It was during that period that the loss took place. In my opinion they also waived the prepayment of the whole of the 9*s.* 11*d.*, though I do not think that the question whether they did that is so material. The counsel for the defendants did not, I think, succeed in making out that the policy was not a deed, and it appears to me impossible for the defendants after the execution of that deed to say that there was no concluded contract. I think that, even if it were shewn—which does not appear to me to be the case—that the deed was delivered as an escrow on condition that it should not be handed over to the person who was to benefit thereby until he had paid the premium, the deed would be as good a deed, whenever the condition was performed, as if it had been originally delivered unconditionally. It would be open to the assured to tender the premium and demand the

deed; and it would make no difference that a loss had then occurred, except that it appears to be an idle form that he should have to tender the premium of 9*s.* 11*d.* when he had a claim for so much larger an amount, and it is obvious that he would be ready and willing to pay the premium, a loss having occurred, and equally obvious that the company would not have received it. It appears to me that it would be his right to have the policy delivered to him, notwithstanding that a loss had happened, paying or allowing in account the amount of the premium. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Harman, Ward & Collier, for Walter and E. H. Foster, Leeds.*

Solicitors for defendants: *Burchells.*

E. L.

[IN THE COURT OF APPEAL.]

MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY *v.* GUARDIANS OF THE POOR OF DONCASTER UNION.

Poor Law—Guardians—Limitation of Time for Payment of Debt—Date from which limited Time runs—Judgment for Costs in the Supreme Court—Allocatur of Master—Poor Law (Payment of Debts) Act, 1859 (22 & 23 *Vict. c.* 49), *s.* 1.

A judgment of the Court of Appeal for payment by guardians of the poor of the costs of an appeal does not constitute a "debt, claim, or demand lawfully incurred or become due" within the meaning of the Poor Law (Payment of Debts) Act, 1859, s. 1, until the amount has been determined on taxation, and the time for payment limited by that Act runs from the date of the allocatur, and not from the date of the judgment.

APPEAL from a judgment of Day J. in favour of the defendants.

In a poor law appeal between the parties to the present action the Court of Appeal ordered that the present defendants should pay to the present plaintiffs the costs of the appeal.

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This judgment was given in July, 1893. The costs were not taken in for taxation for a considerable time, and the master's allocatur was not given until December, 1895. The defendants having declined to pay, this action was brought shortly after the date of the allocatur to recover the amount of the taxed costs.

The defence to the action was based on the 1st section of the Poor Law (Payment of Debts) Act, 1859, which enacts, "With respect to any debt, claim, or demand which may, after the passing of this Act, be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not otherwise; the commencement of such half-year to be reckoned from the time when the last half-year's account shall or ought to have been closed according to the order of the Poor Law Commissioners or Poor Law Board . . . ."

The learned judge decided, on the authority of the Court of Appeal in *Guardians of West Ham Union* v. *Churchwardens, &c., of St. Matthew, Bethnal Green* (1), that the time limited by the statute ran from the date of the judgment, and that the plaintiffs were out of time and could not recover. Subsequently the case cited above came before the House of Lords, where the decision was reversed. (2)

The plaintiffs appealed.

C. A. Russell and *Mansfield*, for the plaintiffs. The judgment of the House of Lords reversing that of this Court was not confined to the case of costs ordered to be paid by that House, but is of general application to cases arising under the statute. The object of the Act, as pointed out by Lord Herschell, was not to limit the rights of creditors, but to direct a time within which the guardians are to discharge their liabilities. In the case of *Metropolitan District Railway Co.* v. *Sharpe* (3), the right to costs under the Lands Clauses

(1) [1895] 1 Q. B. 662. (2) [1896] A. C. 477.
(3) [1880] 5 App. Cas. 425.

Consolidation Act, 1845, was disputed, and it was held that the action was maintainable although there had been no taxation. That is an exceptional case, and the analogy between this case and *Guardians of West Ham Union* v. *Churchwardens, &c., of St. Matthew, Bethnal Green* (1), is complete. The taxing master in this case had nothing to do with the right to costs, which was established, but had only to determine the amount, and till that was done there was no debt due within the meaning of the statute.

[They referred also to *Midland Railway Co.* v. *Guardians of Edmonton Union.* (2)]

Macmorran, Q.C., and *Meek*, for the defendants. In *Midland Ry. Co.* v. *Guardians of Edmonton Union* (2) the case arose out of an appeal at quarter sessions, where nothing is due for costs till the Court has judicially determined the amount. Lord Halsbury was dealing with that point in his judgment in this Court, and that distinguishes the case from the present one. There was here a debt or demand due from the guardians directly the order of the Court of Appeal was made, for the debt or demand may be an unliquidated sum, such as costs due but not ascertained. The decision of the House of Lords in *Guardians of West Ham Union* v. *Churchwardens, &c., of St. Matthew, Bethnal Green* (1), does not go so far as to lay down a general rule that a claim for costs does not constitute a debt within the meaning of this statute until the amount is ascertained by taxation. Such a conclusion was not necessary for the decision of the case, which turned on the standing order of the House of Lords. This particular case was carried to the House of Lords, and the railway company taxed their costs there, and received them; but they left the costs in the Court of Appeal for nearly two years without taking them in for taxation, thereby throwing the burden of them on the guardians long after the time limited by the Act had expired. The plaintiffs should have kept their right to the costs alive, under s. 4 of the statute, by commencing an action within the time limited.

(1) [1895] 1 Q. B. 662.
(2) [1895] 1 Q. B. 357; [1895] A. C. 485.

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[They cited also *Holdsworth* v. *Wilson* (1) and *Reg.* v. *Stepney Union*. (2)]

LORD ESHER M.R. In this case an appeal was brought to this Court, which decided against the now defendants, and by the judgment they were ordered to pay the costs of the appeal. They now say that the time within which they can legally pay the costs is to be reckoned from the date of the judgment, and that the time limited by the statute elapsed before this action was brought to recover those costs, and that therefore they are not bound to pay them. On the other hand, it is said that the time runs from the completion of the taxation of the costs, and, that being so, this action was brought in time. This raises a question on the construction of the 1st section of the Poor Law (Payment of Debts) Act, 1859, and the point for our determination is whether, giving to the decision of the House of Lords in *Guardians of West Ham Union* v. *Churchwardens, &c., of St. Matthew, Bethnal Green* (3), its legitimate effect, it does not bind us in the present case. There the question arose on an order for costs in an appeal to the House of Lords, and it was held that until the amount had been certified by the Clerk of the Parliaments, under the standing orders, there was no "debt, claim, or demand incurred or become due" within the meaning of the statute. It is said that the decision of the House of Lords was based on the construction of the standing orders; but the question is whether the decision was confined to that or dealt with the matter generally, and laid down the law on it. If it did lay down the general law on the matter, we have no right to disregard that, because the Lords who took part in the decision might have decided the question before them on the construction of the standing order. It seems to me that if the Lords based their decision on the standing order only, there was no need for them to consider the opinions of Lord Watson and Lord Herschell given in the case of *Midland Ry. Co.* v. *Edmonton Union*. (4) Lord Herschell referred to those opinions, and adhered to what he then said. He added,

(1) (1863) 4 B. & S. 1.
(2) [1874] L. R. 9 Q. B. 383.
(3) [1896] A. C. 477.
(4) [1895] A. C. 485.

at page 485 of the report: "The first section was not designed, as Statutes of Limitation are, to prevent stale demands, though it may incidentally bar the remedy of creditors who delay asserting their rights. Both in form and purpose it is an injunction on guardians to discharge their obligations promptly." This shews that he meant to found his judgment on the construction which had been intimated in the former case by himself and Lord Watson. What, then, was that construction? It seems to me that it is this. It is true to say that outside this Act of Parliament a judgment for costs enables the party in whose favour it is given to say that they are due, and to maintain an action for them, so that the right to costs arises on the judgment of the Court, though at that time they are not taxed; but within the meaning of this Act, where those who are ordered to pay costs are a board of guardians, they are not bound to pay till the costs are taxed; and that being so, the period from which the time limited is to run is not that at which judgment was given, but that at which they are bound to pay—that is, the time when the costs are ascertained by taxation. I think we are bound by that decision, and must say that in this case the time limited by the statute ran from the completion of the taxation; and the appeal should, therefore, be allowed.

LOPES L.J. I am of the same opinion. I cannot distinguish between this case and *Guardians of West Ham Union* v. *Churchwardens, &c., of St. Matthew, Bethnal Green.* (1) The question is whether the House of Lords intended to base their decision solely on the standing order, or generally on the proper construction of s. 1 of the Poor Law (Payment of Debts) Act, 1859. In my opinion the latter is the case. I cannot arrive at any other conclusion on reading the opinion of Lord Herschell, and I cannot see that any valid distinction can be drawn between a case arising on a taxation and certificate by the Clerk of the Parliaments and one arising on a taxation and allocatur by an officer of the High Court. I think, therefore, that this appeal must be allowed.

(1) [1895] 1 Q. B. 662.

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RIGBY L.J. If the recent decision of the House of Lords depended on a state of things peculiar to a proceeding before the House, it might be that it would not be binding on us in the present case. Looking at the judgments in that case, I do not think they were so limited, but that they are of general application. The question that arises on such a case as the present is, to my mind, not whether an action could be brought to recover untaxed costs, or whether an order for costs has been made, but whether the circumstances are such that the guardians are under an obligation to pay. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Cunliffes & Davenport, for John Storey, Leicester.*

Solicitors for defendants: *Van Sandau & Co., for S. E. Nicholson, Doncaster.*

A. M.

1896
Nov. 2.

In re PAINE.
Ex parte READ.

Bankruptcy—Fraudulent Preference—Surety—Payment into Bank to meet Accommodation Bill—"Creditor"—Bankruptcy Act, 1883, *ss.* 37, 48.

The word "creditor" in s. 48 of the Bankruptcy Act, 1883 (which avoids as a fraudulent preference a payment made by an insolvent debtor out of his own moneys in favour of any creditor with a view to prefer such creditor), means any person who at the date of the payment is entitled, if bankruptcy supervenes, to prove in the bankruptcy and share in the distribution of the bankrupt's estate. A surety, who has a right of proof under s. 37 of the Act in respect of his contingent liability as surety, is such a person. A payment, therefore, to or for the benefit of a surety, before he has been called upon to pay as surety, may be a fraudulent preference.

THIS was an application by the trustee in bankruptcy which raised the question whether a certain payment made by the bankrupt was a fraudulent preference within s. 48 of the Bankruptcy Act, 1883.

About April 17, 1895, a bill for 20*l.*, which had been accepted

by one Barnard for the accommodation of the bankrupt, and had been discounted for the bankrupt by his bankers, fell due. Thereupon the bankrupt paid in 20*l.* to his bank to meet the bill.

On May 8, 1895, a receiving order was made against the bankrupt, and on May 13 he was adjudicated bankrupt, and a Mr. Read became the trustee in bankruptcy. In his examination the bankrupt admitted that he had paid in the 20*l.* to meet the bill with a view to prefer Barnard. He was insolvent at the time he made the payment. The trustee now claimed payment of 20*l.* from Barnard on the ground that the circumstances under which the 20*l.* was paid into the bank to meet the bill was a fraudulent preference by the bankrupt of Barnard within s. 48 of the Bankruptcy Act, 1883.

Muir Mackenzie, for the application.

F. C. Willis, for Barnard. The word "creditor" in s. 48 means a person who is an actual creditor at the date of the payment irrespective of any subsequent accruing bankruptcy, and does not include a person who may become a creditor by being called upon to pay as surety. Here, Barnard was under a contingent liability, no doubt; but he would have had no right of proof under s. 37 until he had paid the principal creditor. Further, a payment made with the view of preventing a surety from being called upon to pay is not a fraudulent preference: *In re Mills*. (1)

Muir Mackenzie, in reply. The case of *In re Mills* (1) does not apply. Barnard at the time of the payment was under a contingent pecuniary liability as a surety, which was a provable debt under s. 37 of the Act, if bankruptcy supervened: *Wolmershausen* v. *Gullick*. (2) As a surety he could have brought an action in equity: *Lacey* v. *Hill*. (3) Under the circumstances, he was a "creditor" within the meaning of s. 48.

VAUGHAN WILLIAMS J. I have to decide this question merely upon what seems to me to be the true construction of the Act of Parliament, and I need not trouble myself to

(1) (1888) 5 Morr. 55. (2) [1893] 2 Ch. 514.
(3) (1874) L. R. 18 Eq. 182.

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In re PAINE. *Ex parte* READ.

Vaughan Williams J.

distinguish between legal and equitable considerations. Now, Mr. Barnard was a creditor of the bankrupt in the sense that, if bankruptcy supervened, he would have had a right to prove and to share in the distribution of the bankrupt's assets. That being so, what is the meaning of the word "creditor" in s. 48? The Act contains no definition of the word, and, therefore, to arrive at the meaning I must look at the history of the section. One knows that the doctrine of fraudulent preference was introduced to prevent payments made by insolvent debtors in contemplation of bankruptcy—that is to say, in contemplation of the administration by the Court of the bankrupt's estate rateably amongst those persons who would be entitled to share in the distribution of that estate. In my judgment, when once I arrive at that I must come to the conclusion that the word "creditor" in s. 48 must mean a person who would be entitled to prove and to share in that distribution. I think the Legislature in enacting the section intended to prevent a payment to anybody who, but for such payment, would share in the administration of the bankrupt's estate. I think, therefore, that the word "creditor" means any person who, at the date of the payment to him, would have had to come in and prove and rank with the other creditors in the bankruptcy. A surety would be such a person. I hold, therefore, that you may make a fraudulent preference by a payment to or for the benefit of a surety who has not yet been called upon to pay as surety. It is not disputed that at the date of the payment into the bank Barnard was a person who had a right of proof under s. 37 in respect of his contingent liability as acceptor of the bill. He had a right, therefore, to share in the distribution of the bankrupt's assets; and under the circumstances I hold that the payment into the bank was a fraudulent preference of Barnard by the bankrupt.

Solicitors for trustee: *Pritchard, Englefield & Co.*
Solicitors for Barnard: *W. H. Smith & Son.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.

1896

Oct. 31;
Dec. 9.

DARLOW *v.* BLAND AND OTHERS.

Bill of Sale—Consideration not truly stated—Sum payable in future—Sum under 30l.—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9, 12.

A bill of sale purported to be given in consideration of 13*l.* 12*s.* then owing by the grantors upon a promissory note and of 16*l.* 8*s.* then paid to the grantors, making together the sum of 30*l.*, the receipt of which the grantors thereby acknowledged. The promissory note referred to was for the sum of 14*l.* 3*s.* 4*d.* payable by weekly instalments of 11*s.* 4*d.*, of which one had been paid and the remainder had not become payable when the bill of sale was given. The consideration paid for the promissory note was 10*l.* only. The sum of 16*l.* 8*s.* was paid to the grantors upon the execution of the bill of sale:—

Held, that the bill of sale was void as not truly stating the consideration for which it was given, and as being given in consideration of a sum under 30*l.*

APPLICATION by defendants for judgment or new trial in a case tried before the assessor of the Liverpool Court of Passage.

The action was for a balance of 13*l.* 12*s.* due upon a promissory note made by the defendants Annie Amelia Bland, George Topham, and Priscilla Topham his wife. The defendants Topham and wife counter-claimed for wrongful seizure of goods by the plaintiff. The plaintiff justified the seizure complained of under the bill of sale after mentioned. By a promissory note dated December 31, 1895, the three defendants jointly and severally and each respectively as principals promised to pay to the plaintiff or order the sum of 14*l.* 3*s.* 4*d.* by instalments of 11*s.* 4*d.* on Monday, January 6, 1896, and the like sum, 11*s.* 4*d.*, on each and every succeeding Monday for twenty-four further weeks; and in case default should be made in payment of any one or part of the said instalments, they jointly and severally promised to pay on demand the whole balance then remaining unpaid of the first-named sum, together with interest thereon at and after the rate of one halfpenny per shilling per week from the date of such default until payment thereof. The consideration for the making of the promissory note was an

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advance of 10*l.* by the plaintiff. (1) The first instalment due upon the promissory note was duly paid. On January 13, 1896, the defendants Topham and wife executed a bill of sale of certain personal chattels in favour of the plaintiff. A further sum of 16*l.* 8*s.* was advanced by the plaintiff to the Tophams upon the execution of the bill of sale. The bill of sale purported to be given "in consideration of the sum of 13*l.* 12*s.* now owing by George Topham and Priscilla Topham under a promissory note dated the 31st of December, 1895, and of 16*l.* 8*s.* now paid to George Topham and Priscilla Topham by Elizabeth Darlow, making together the sum of 30*l.*, the receipt of which the said George Topham and Priscilla Topham hereby acknowledge." It was contended for the counter-claiming defendants that the bill of sale was void as not truly stating the consideration for which it was given, and as being given in consideration of a sum under 30*l.* The jury provisionally assessed the damages upon the counter-claim at 40*l.* The learned assessor directed a verdict to be entered for the plaintiff on the claim, and also on the counter-claim.

Frank Dodd, for the defendants. The defendants Topham and wife are entitled to judgment for the damages found by the jury on the counter-claim. The consideration for the bill of sale is not truly stated. The defendants were entitled to the days of grace upon the falling due of each instalment of the promissory note: *Oridge* v. *Sherborne*. (2) Consequently there had been no default in payment of any instalment, and there was no sum owing on the promissory note when the bill of sale was given. The statement in the bill of sale imports that a total sum of 30*l.* had been received by the grantors, whereas only 26*l.* 8*s.* had in fact been advanced to them. The bill of sale is void under the Bills of Sale Act, 1882, s. 12, as having

(1) It was alleged by the defendant Bland that she had joined in the promissory note merely as surety for the Tophams, and the defence set up by her to the claim was that she was discharged from liability by the subsequent dealings of the plaintiff with them. That defence failed, and the question raised by it is not material to the point here reported, which concerns the counter-claim only.

(2) (1843) 11 M. & W. 374.

been given in consideration of a sum under 30*l.* [He cited *Richardson* v. *Harris* (1); *Mayer* v. *Mindlevich*. (2)]

Lochnis, for the plaintiff. The consideration for the bill of sale is truly stated. It is submitted that money may correctly be said to be "owing" though it is not payable till a future date. It is debitum in præsenti solvendum in futuro. In *Mayer* v. *Mindlevich* (2) the liabilities were merely contingent. In this case the instalments payable under the promissory note must become payable. The bill of sale is not void under s. 12 of the Bills of Sale Act, 1882, as being given in consideration of a sum under 30*l.* It was given in consideration of a sum of 30*l.*, consisting in part of a fresh advance and in part of a sum of money already owing.

F. Dodd, in reply.

Cur. adv vult.

Dec. 9. LOPES L.J. read the following judgment:—Several points were raised in this case, but it is only necessary to consider the point arising on the validity of the bill of sale.

The Bills of Sale Act, 1882, requires by s. 8 that every bill of sale like the present "shall truly set forth the consideration for which it is given." It is said that this bill of sale does not comply with that requirement. I am clearly of opinion that it does not.

This bill of sale purports to be given "in consideration of the sum of £13 12*s.* now owing by George Topham and Priscilla Topham under a promissory note dated 31 Dec. 1895 and of £16 8*s.* now paid to George Topham and Priscilla Topham, making together the sum of £30, the receipt of which the said George Topham and Priscilla Topham hereby acknowledge." All that was actually paid was 26*l.* 8*s.*, being 16*l.* 8*s.* on execution of the bill of sale and 10*l.* the consideration for the promissory note, but the receipt of the full sum of 30*l.* is acknowledged. This is not in accordance with the facts and is untrue, because 26*l.* 8*s.* was all that was really received. Sect. 9 of the Act of 1882 provides that a bill of sale like the present is to be void unless made in accordance with the form

(1) (1889) 22 Q. B. D. 268. (2) (1888) 59 L. T. 400.

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in the schedule. The form says, "in consideration of the sum of £—— now paid to A.B. by C.D., the receipt of which the said A.B. hereby acknowledges," contemplating a then existing debt then payable. But the consideration here is not truly stated. 30*l.* was not received. The 13*l.* 12*s.* was not then payable, and only a portion of it—namely, 10*l.*—was received. If a bill of sale like this was held to be good, it would be rendering nugatory the provision contained in s. 12 of the Act, which says: "Every bill of sale made or given in consideration of any sum under £30 shall be void." How can it be said that this bill of sale was not given for a sum under 30*l.*? It was given for 26*l.* 8*s.*, and when the grantors acknowledged the receipt of 30*l.* (which I can only understand as 30*l.* in cash) they said that which was untrue. On the ground that the consideration was not truly stated, and also on the ground that the bill of sale was given for a sum under 30*l.*, I think it is bad.

RIGBY L.J. read the following judgment:—The only question on this appeal which was left for decision by the Court was the validity of the counter-claim of the defendants, Topham and wife, for damages occasioned by the plaintiff's taking and converting goods and chattels of the same defendants. The plaintiff justified the taking and conversion of the goods as done under the authority of a bill of sale dated January 13, 1896; and the point to be determined is whether that was a valid bill of sale. If it was, the judgment entered for the plaintiff on the counter-claim will stand; if it was not, judgment on the counter-claim must be given for Topham and wife for 40*l.*, the amount of damage ascertained by the jury. The bill of sale is said to be void—(1.) because it did not truly set forth the consideration for which it was given within the meaning of s. 8 of the Bills of Sale Act, 1878, Amendment Act, 1882; and (2.) because it was made or given in consideration of a sum under 30*l.* within the meaning of s. 12 of the same Act. As, however, the consideration appearing on the face of the bill of sale is 30*l.*, the second objection cannot arise unless the first is determined in favour of the defendants; but the smallest

excess in the statement of the consideration will make s. 12 applicable.

The bill of sale purports to be given "in consideration of the sum of 13*l.* 12*s.* now owing by George Topham and Priscilla Topham under a promissory note dated December 31, 1895, and of 16*l.* 8*s.* now paid to George Topham and Priscilla Topham, making together the sum of 30*l.*, the receipt of which the said George Topham and Priscilla Topham hereby acknowledge." It is not disputed that the 16*l.* 8*s.* was actually paid over on the execution of the bill of sale, and the truth of the statement as to the 13*l.* 12*s.* forming part of the consideration is alone in dispute, and depends upon the facts in respect to that sum, which are as follows.

On December 31, 1895, the counter-claiming defendants and the other defendant, Mrs. Bland, gave to the plaintiff a promissory note, of which the following is a copy:—

"Liverpool. December 31, 1895. 14*l.* 3*s.* 4*d.* For value received we jointly and severally and each respectively as principals promise to pay to Elizabeth Darlow or order the sum of fourteen pounds three shillings and fourpence by instalments of eleven shillings and fourpence on Monday the 6th day of January 1896 and the like sum 11*s.* 4*d.* on each and every succeeding Monday for 24 further weeks, and, in case default be made in payment of any one or part of the said instalments, we jointly and severally promise to pay on demand the whole balance then remaining unpaid of the first-named sum together with interest thereon at and after the rate of one halfpenny per shilling per week from the date of such default until payment thereof."

The actual consideration paid for the promissory note was 10*l.* only. Notwithstanding the fact that the defendant Bland expressly contracts as principal, it is said that as between her and the other defendants she was a surety only, and that the whole sum of 10*l.* was in fact received by the counter-claiming defendants; but no question depending upon that allegation is now before the Court. The first instalment of 11*s.* 4*d.* payable under the promissory note was duly paid. As the makers of the note were entitled to the usual days of grace in respect of

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each instalment, the second instalment did not become in fact due and payable until January 16, 1896. Therefore, on January 13, the only liability of the counter-claiming defendants to the plaintiff was to pay the future instalments as they fell due. The sum of 13*l.* 12*s.* not being actually due, the acknowledgment of the receipt of the full sum of 30*l.* appearing in the bill of sale was not in accordance with the facts. From no point of view could it be said that more than 10*l.* had been received prior to the date of the bill of sale, and, taking into account the 16*l.* 8*s.* paid at the time of execution, the whole amount actually received was 26*l.* 8*s.* only, a sum not sufficient to avoid the operation of s. 12 of the Act. Again, there was no intention to release the counter-claiming defendants, or the other defendant Bland, from their liability under the promissory note. In fact, in this action the plaintiff has recovered on the promissory note the sum of 13*l.* 12*s.* against all three defendants. There could therefore have been no agreement to treat the 13*l.* 12*s.* as a present advance in lieu of the sum or sums payable on the note, if the existence of such an agreement in fact would have been sufficient without being mentioned in the bill of sale. The cases under the Act of 1878 established the principle that, if the consideration is stated in a manner which may be considered to amount substantially to an accurate representation of the real facts, it is stated with sufficient truth to satisfy the requirements of the Act: per Fry L.J. in *Ex parte Johnson* (1), a case relied upon by the learned judge in the Court below; or in the words of the Master of the Rolls in *Credit Co.* v. *Pott* (2), cited by Bowen L.J. in the same case of *Ex parte Johnson* (3), it is sufficient if the facts are accurately stated either as to their legal effect or as to their mercantile and business effect, though they may not be stated with strict accuracy. But here the consideration is not stated accurately either as to its legal effect or as to its mercantile and business effect, for there is a substantial difference from each point of view between a present advance of a sum of money and a liability to pay the same sum by instalments at future dates.

(1) (1884) 26 Ch. D. 338, at p. 351. (2) (1880) 6 Q. B. D. 295, at p. 299.
(3) 26 Ch. D. at p. 349.

It was suggested that the payments to be made in future under the promissory note were present debts, though payable in future, and that there was no substantial inaccuracy in saying that the whole amount of the instalments was "now owing," whatever might have been the effect of saying that they were due as well as owing. But when, as here, the question is as to the present value in money of the obligation to pay, it is both in a legal and in a business point of view altogether misleading to take the debt at its full amount as "now owing," the present value being obviously less than the whole sum payable in future. This point appears to be covered, if authority is required, by the decision of Lopes L.J., affirmed by the Court of Appeal, in *Cochrane* v. *Moore*. (1) There the consideration for a bill of sale dated July 26, 1888, purported to be a sum of 7575*l*. then owing by Benzon to Cochrane, and a further sum of 2425*l*. then paid by Cochrane to Benzon, making together 10,000*l*. In fact, at the date of the bill of sale, Benzon was only indebted to Cochrane on two promissory notes then current and payable respectively in August and September for sums amounting together to 8300*l*. It was said that by an agreement arrived at at the time this 8300*l*. due in future was to be taken between the parties as represented by the sum of 7575*l*. But it was held that, if the agreement existed, it ought to have been stated in the bill of sale, and, that not having been done, the document was void as not truly stating the consideration for which it was given. There was in that case a present liability for 8300*l*. payable in future, and, independently of any agreement, it would according to the argument have been right to say that 8300*l*. and a fortiori 7575*l*. was "now owing."

LORD ESHER M.R. concurred.

Judgment for defendants on counter-claim.

Solicitors for plaintiff: *Bell, Brodrick & Gray, for Cecil B. Taylor, Liverpool.*

Solicitors for defendants: *Ridsdale & Sons, for H. Davies, Liverpool.*

(1) (1890) 25 Q. B. D. 57, at p. 73; 59 L. J. (Q.B.) 377.

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Nov. 3, 5, 14.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* LORD LEIGH AND OTHERS, THE STANDING JOINT COMMITTEE FOR THE COUNTY OF WARWICK.

In re KINCHANT.

Police—Pension—Cancellation—Constable — Incapacity by Infirmity—Police Authority—Attendance for Medical Examination—Collateral Purpose—Illegal Stoppage of Pension—Mandamus—Police Act, 1890 (53 *&* 54 *Vict. c.* 45), *s.* 1 (*a*), (*b*); *s.* 5, *sub-ss.* 1, 3, 4, 7; *s.* 12.

The power conferred upon a police authority by the Police Act, 1890, s. 5, of requiring a pensioner to attend to be examined by a medical practitioner selected by them at a particular time and place, for the purpose of satisfying them that his incapacity to serve continues, cannot be exercised by the police authority for any collateral purpose.

A police authority has no power under s. 5, sub-s. 4, of the Act to cancel a pension without requiring the pensioner to serve again.

A police authority has power to fix the time and place for the examination of the pensioner by the medical practitioner whom they may select under the provisions of s. 5 of the Police Act, 1890.

A police authority, on July 12, 1894, resolved that their former chief constable, to whom they had granted a pension on the ground of incapacity by infirmity, should attend at Warwick on a specified day and hour for the purpose of being examined by two doctors as to his state of health, and that if he failed to do so his pension should be cancelled.

The pensioner had been declared bankrupt in 1891, and in 1892 a warrant had been issued for his arrest, on the ground that he being out of England had not attended his adjourned examination in bankruptcy. He had been residing in Portugal since April, 1892; but in March, 1893, he had come to England for a day or two, and had been examined by a doctor, selected by the police authority, who had certified his continuing incapacity. He did not attend in compliance with the resolution of July 12, 1894, and the police authority cancelled his pension:—

Held, upon the evidence, that the police authority had used their statutory power of requiring the pensioner's attendance at Warwick, not for the purpose of satisfying themselves as to his continued incapacity, but for the purpose of assisting the Bankruptcy Court; and, consequently, that they had exceeded their jurisdiction, and the pensioner was entitled to a mandamus calling upon the police authority to shew cause why they should not pay him the arrears of his pension.

APPEAL against the refusal of Cave J. and Wills J., sitting as a Divisional Court, to direct the issue of a writ of mandamus

calling upon the standing joint committee, who are the police authority for the county of Warwick, to shew cause why they should not pay to the applicant the arrears of a pension granted to Mr. R. H. Kinchant, late chief constable of Warwickshire.

By the Police Act, 1890, s. 1, every constable in a police force (which, by s. 12, includes a chief constable), (*a*) if he has completed not less than twenty-five years' approved service . . . . shall be entitled without a medical certificate to retire and receive a pension for life; and (*b*) "if, after he has completed fifteen years' approved service he is incapacitated for the performance of his duty by infirmity of mind or body, shall be entitled, on a medical certificate, to retire and receive a pension for life."

By s. 5, sub-s. 1, before granting a pension on the ground of incapacity by infirmity the police authority shall be satisfied by the evidence of some legally qualified medical practitioner or practitioners selected by them that the constable is so incapacitated, and that the incapacity is likely to be permanent.

Sect. 5, sub-s. 3, is as follows: "Where a pension is granted to a constable on the ground of incapacity for the performance of his duty, the police authority shall, yearly or otherwise, until the power under this Act of requiring the constable to serve again ceases, satisfy themselves that the incapacity continues, and, unless they resolve that such evidence is unnecessary, shall satisfy themselves by the like evidence as above mentioned."

The other material sub-sections of s. 5 are as follows: By sub-s. 4 it is enacted, "In the event of the incapacity ceasing . . . . the police authority may cancel his pension and require him to serve again in the police force in a rank not less than the rank which he held before his retirement, and at a rate of pay not less than the rate which he received before his retirement"; and by sub-s. 7 it is enacted, "That if a constable" (read chief constable, s. 12) "fails or refuses when required by the police authority to be examined by some legally qualified medical practitioner selected by that authority, the police authority may deal with the constable in all respects as if they were satisfied by the evidence of such a practitioner that the constable is not incapacitated from the performance of his duty."

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Prior to the month of December, 1891, Mr. Kinchant had completed twenty-two years' approved service in the police force, during the last sixteen years of which he had held the office of chief constable, and in that capacity he was well known to many of the standing joint committee, who were the police authority, and consisted of twenty justices of the peace of the county and twenty town councillors.

On December 7, 1891, Kinchant tendered his resignation of the office of chief constable, upon the ground of incapacity by infirmity to perform his duty; and the standing joint committee, hereafter called the committee, accepted his resignation, and selected Dr. Rankin of Warwick, as their duly qualified medical practitioner, to give evidence, pursuant to s. 5 of the Police Act, preparatory to granting a pension. Dr. Rankin gave evidence that Kinchant was incapacitated by infirmity of mind and body for the performance of his duty as chief constable, and that the incapacity was likely to be permanent.

On December 19, 1891, and before the pension was granted, a receiving order in bankruptcy was made against Kinchant, and on December 30, 1891, he was adjudicated bankrupt.

On January 18, 1892, the committee, being satisfied with the evidence of Dr. Rankin, by resolution granted Kinchant a pension of 192*l.* a year for life; and by a subsequent resolution of the same date they appointed Captain Brinkley to be chief constable in his place. This pension was subsequently, in March, 1892, assigned under the provisions of s. 7 of the Police Act, 1890, by Kinchant to a trustee upon trust for himself and his family.

On February 18, 1892, the examination in bankruptcy of Kinchant took place, and, having lasted the day, was adjourned to May 11, 1892. When May 11 came Kinchant did not attend to be further examined, and it appeared from the evidence that in the previous month of April he had gone to Cintra, near Lisbon, in Portugal, for the purpose (according to the view of the Court) of avoiding further examination and of defeating his creditors; and a warrant for his arrest was issued by the Court of Bankruptcy. According to the evidence, from that time till the present, with the exception of one visit to this

country in March, 1893, Kinchant had continued to reside at Cintra, and the warrant remained unexecuted.

On July 11, 1892, the committee resolved that no further payment of Kinchant's pension should be made after September 29 then next until the committee was satisfied by the evidence of Dr. Rankin that he was still incapacitated by infirmity for the performance of his duty. On October 10, 1892, however, this resolution was rescinded upon a certificate by Dr. Lahmeyer, the physician to the English Embassy at Lisbon, which was forwarded to the committee, that Kinchant was then suffering from crural hernia and weakness of the brain, and was unfit for duty, and upon the statement by Dr. Rankin that it might be dangerous for Kinchant to travel; and the committee resolved that the payment of the arrears should not be withheld by reason of Kinchant's failure to attend for examination. The pension was accordingly paid down to Christmas, 1892.

On December 4, 1892, in answer to Dr. Rankin, Dr. Lahmeyer wrote stating that he was convinced that Mr. Kinchant was suffering from a very serious chronic and organic disease, which was enough to incapacitate him for mental duties, and that such incapacity was likely not only to be permanent, but to increase; adding that, notwithstanding this, he considered Mr. Kinchant in a fit state to travel to England, not by land but by sea, and not alone. This letter was communicated to the committee; and on January 16, 1893, they resolved that Kinchant should submit himself to Dr. Rankin for examination at or near Warwick on or before March 25 then next, and, failing this, that his pension should be cancelled.

In compliance with this order Kinchant came over from Portugal by sea, and went to Leamington to the house of Mr. Sanderson, who was the trustee of his pension, where, upon the evening of March 3, 1893, he was examined by Dr. Rankin, and the next morning he left Leamington and went back to Cintra.

On March 18, 1893, Dr. Rankin reported to the committee that he had examined Kinchant on March 3, and that he was not in a fit state of health to undertake responsible duty.

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On March 30 the official receiver in bankruptcy wrote to the committee a letter complaining that the police authority had not assisted the Bankruptcy Court in executing its warrant, and containing this passage :—

"I (i.e. the official receiver) beg, therefore, to enter very respectfully, but most emphatically, a strong protest against the payment of any portion of the bankrupt's pension to his assignee, on the ground that it is an anomalous thing for a bankrupt to be provided by a public body with funds which enable him to set the orders of a court of law at defiance, and, further, that with the aid of public officials, the bankrupt has been allowed to evade the examination of the Court."

On April 10, 1893, the committee wrote to the Home Office a letter, stating that Dr. Rankin had reported that Kinchant had presented himself for examination, and that he was not in a fit state to undertake duty, and setting forth the letter written to them by the official receiver on March 30, and further stating that the police authority considered that they were bound to continue to pay the pension for another year, and suggesting that possibly s. 10 of the Police Act, 1890 (relating to dismissal and refusal of pension), might be brought into play.

On April 13, 1893, the Home Office sent back an answer stating that the warrant for the arrest of Mr. Kinchant not being for a criminal offence, his pension was not forfeited under s. 8 of the Police Act, 1890, and suggesting that the police authority should either abstain from paying the pension till ordered by a court of law so to do, or should under s. 5 call upon Kinchant again to submit himself to medical examination before the year from the last examination should have expired, and should require him to appear at Warwick on some day about a month hence, to be fixed by them, before a medical man (not Dr. Rankin) to be named by the committee; and the letter concluded: "The Secretary of State is confident that the standing joint committee will do all in their power to support the Court of Bankruptcy in this matter."

Upon receipt of this letter the committee, upon April 17, 1893, resolved by the votes of twenty-one to four that they

were satisfied by the evidence of Dr. Rankin that Kinchant's incapacity to serve again continued, and that his pension due on March 25, 1893, should be paid; and they further resolved that Kinchant should be required to present himself at the county police head quarters in Warwick on June 12 then next between 1 and 3 P.M. for examination as to the state of his health by two medical practitioners, and that upon his failing to do so his pension should be cancelled.

Mr. Kinchant did not present himself on June 12; and upon July 17, 1893, the committee resolved that as he had not done so his pension should be cancelled, and he should be required to serve again. A certificate of Dr. Lahmeyer that Kinchant could not attend on account of ill-health, and was still quite unfit for mental and bodily work, was afterwards sent to the committee; but upon October 9, 1893, they dismissed Kinchant from the force.

The committee were subsequently advised by Mr. Dickens, Q.C., that their order of April 17, 1893, and the subsequent orders founded thereon, could not be supported; and, acting upon this opinion, they, on April 16, 1894, rescinded the cancellation of the pension and Kinchant's dismissal from the force, and passed a resolution that the arrears of his pension should be paid to him. In the meantime Dr. Lahmeyer had on March 29, 1894, again given a certificate in which he stated that Kinchant had been under his treatment for nearly two years, and was still unfit, and never had during that time been fit, for any sort of work.

The arrears of the pension from June 13, 1893, to June 24, 1894, were accordingly paid; but no payment in respect of the pension had been made since the latter date.

Various efforts were made on behalf of Kinchant's wife and family to obtain payment of the pension; and the committee took the opinion of Mr. Poland upon the case, and ultimately, disregarding (in the view taken by the Court) Mr. Poland's opinion, and following that of the Home Office, they passed a resolution on July 12, 1894, that Kinchant should attend the chief constable's office at Warwick on Friday, August 31, 1894, for the purpose of examination as to the state of his health by

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two medical practitioners approved of by the committee, and that no further pension should be paid to Mr. Kinchant until the report of such examination had passed the committee, and, failing submission to such examination, the pension should be cancelled and Mr. Kinchant's name be struck off the list of police pensioners. This having been done, Mr. Sanderson, the trustee of the pension, applied to the Court of Queen's Bench for a mandamus calling upon the committee to shew cause why they should not pay to him the sum of 288*l.*, which was the amount of the arrears then due upon the pension.

It appeared from the evidence that after November 6, 1894, Kinchant was not liable to be required to serve again.

The application came on for hearing before Cave and Wills JJ. on July 25, 1896, when the learned judges differed in opinion, Cave J. being for discharging the rule nisi for the mandamus, and Wills J. for making it absolute; and in order to admit the right to appeal, Wills J. as junior judge withdrew his judgment, and the rule nisi was discharged with costs.

Mr. Sanderson appealed, and the appeal was heard on November 3 and 5.

Dickens, Q.C., and *Atherley Jones*, for the appellant. The committee derive the powers which they have purported to exercise under s. 5, sub-ss. 3, 5, 7, of the Police Act, 1890; but those statutory powers were given in order to enable a police authority who have granted a pension to "satisfy themselves," by the evidence of some legally qualified medical practitioner or practitioners, that the pensioner's "incapacity continues." It is clear upon the evidence that the committee have not used this power for the purpose of satisfying themselves as to the state of Mr. Kinchant's health, but for the purpose of assisting the Bankruptcy Court by forcing him to return within the jurisdiction under circumstances which would enable that Court to arrest him under the warrant. The order made by the committee by their resolution of July 12, 1894, was accordingly an illegal order which Kinchant was not bound to obey, and he has been illegally deprived of his pension.

2. Again, the committee had no power to cancel Kinchant's

pension without requiring him to serve again in the police force as chief constable, and this they did not do. They never gave him the opportunity of serving again, and had incapacitated themselves from so doing by appointing Captain Brinkley as his successor.

3. Moreover, the police authority have no power to prescribe the time when and the place at which the pensioner is to attend for examination as to the state of his health, or if they have it must be reasonably exercised; and they had no power in this case to order Kinchant to come from Portugal to Warwick for the purpose. Nothing is said in the Act about time or place, and this body ought not to act oppressively or capriciously, but according to ordinary principles of justice. They cannot require impossibilities, as that would shew mala fides. They cannot, for instance, require a poor and paralyzed pensioner residing in Cornwall to present himself yearly for examination at Newcastle. On November 6, 1894, their power to examine Kinchant clearly came to an end. He had already in 1893 travelled from Portugal to Warwick and back at a cost of 25*l*. There was no suggestion that he was shamming illness, nor is there any evidence to shew that he wished to avoid examination into the state of his health; but he had neither the strength nor the means to go back and forward in this way. The police authority could have had him examined at Lisbon by the physician to the British Embassy, and it is obvious that in requiring him to return to Warwick, instead of examining him on the spot, they were doing so for the collateral purpose of securing his arrest.

Channell, Q.C., and *Darlington*, for the respondents. The power to require a pensioner to submit himself for examination as to the state of his health for the purpose of satisfying the police authority that his incapacity continues is a discretionary power; and if the police authority used it with honesty and bona fides their decision is conclusive and cannot be impugned. In this case the police authority (under the circumstances quite naturally) suspected that Kinchant was not living at Cintra for reasons of health only, but in order to escape examination and to defy the laws of his country. There is

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evidence to shew that several members of the committee were not satisfied as to Kinchant's incapacity to serve. Again, there was nothing to shew that Dr. Lahmeyer was a duly qualified medical practitioner, or that there was any one at Cintra on whom the committee could rely, and it is for the appellant to shew mala fides on the part of the committee, which he has entirely failed to do.

2. The provision in s. 5, sub-s. 4, that the police authority "may cancel his pension and require him to serve again," is permissive and enabling only. "May" is not to be read as "must": *Julius* v. *Bishop of Oxford* (1); and the fact that the police authority here did not couple the cancellation of Kinchant's pension with an offer to reinstate him does not in any way invalidate their action. Under the circumstances it would have been absurd to propose to him to serve again.

3. It cannot have been intended that the pensioner should have the power to fix the time and place for his own examination; and in this case the pensioner for his own purposes voluntarily went to live abroad out of the jurisdiction.

Dickens, Q.C., in reply.

Cur. adv. vult.

Nov. 14. A. L. SMITH L.J. The point to be determined in this case is whether the payment of Mr. Kinchant's pension has been legally stopped by reason of his non-compliance with the requirement of the resolution passed by the standing joint committee upon July 12, 1894, which was that he should attend at the chief constable's office at Warwick on Friday, August 31, 1894, between the hours of 12 noon and 3 P.M., for the purpose of examination as to the state of his health by two medical practitioners appointed by the committee.

The question comes to this: Was the order that Kinchant should submit himself for medical examination at the chief constable's office at Warwick made for the purpose of satisfying the standing joint committee as to his then state of health, in which case it would have been an order made by the committee within the jurisdiction conferred upon them by the Police Act,

(1) (1880) 5 App. Cas. 214.

1890; or was the order made, not for that purpose, but for some other purpose, in which case it would not be within the jurisdiction of the committee to make the order, and in which case the refusal of Mr. Kinchant to comply with it would afford no ground for stopping and cancelling his pension?

[The Lord Justice then stated the facts of the case to the effect above stated down to the resolution passed by the committee upon January 16, 1893, requiring Mr. Kinchant to submit himself for examination at Warwick on March 25, 1893, and continued:—]

I do not find at this date (nor, indeed, down to July 12, 1894, nor afterwards) throughout the numerous resolutions and other documents in this case any evidence to shew either that Kinchant had ceased to be incapacitated to perform the duties of chief constable, or that what Dr. Rankin and Dr. Lahmeyer had from time to time stated about him was not the truth; but, on the contrary, the evidence contained in the documents is all the other way, shewing the continued incapacity of Kinchant.

It will be observed that in the resolution of January 16, 1893, Dr. Rankin is again the selected medical adviser of the standing joint committee to examine Kinchant.

What Kinchant did in answer to this order to come over and be examined was this. He came over by sea and went to Mr. Sanderson's house at Leamington, where upon the evening of March 3, 1893, he was examined by Dr. Rankin, and early the next morning he left Leamington and went back to Cintra, where he has since resided.

I see that in the prior year—namely, on July 11, 1892—the committee had resolved that Mr. Sanderson be required to arrange for the attendance of Mr. Kinchant on Dr. G. Rankin at Warwick (or some convenient place near Warwick), so that there was nothing remarkable in Kinchant going to the house of Mr. Sanderson, the trustee to whom his pension had been assigned for the benefit of Kinchant's family. But, although this is so, I have no doubt that the way in which this attendance in England to be examined was carried out by Kinchant, and probably Sanderson, was to evade the execution of the warrant which was out against him; but this affords no reason for

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cancelling his pension unless it is to be inferred that he acted as he did because his incapacity had ceased, and he did not wish this to be discovered. Upon the established facts of the case I can draw no such inference. He submitted himself at the expense of 25*l.* to the examination of the committee's own medical man; he obeyed their order by travelling some 1200 miles from Cintra to Leamington to do so, though by the course he adopted he evaded the execution of the warrant of arrest of the Bankruptcy Court upon him. Being able to travel by sea, as Dr. Lahmeyer had certified he was on December 4, 1892, is a very different thing from being capable of performing the duties of chief constable of Warwickshire.

[The Lord Justice then referred to Dr. Rankin's report of March 18, the official receiver's letter of March 30, and the letter of the committee to the Home Office of April 10, 1893, and continued:—]

It is clear that at this time Kinchant was living at Cintra in order to defraud his creditors and evade the bankruptcy laws of this country, and it is not surprising that the committee should resent having to pay a man a pension out of the county rates when he was remaining abroad defrauding his creditors and defying the bankruptcy laws, and should be desirous if possible of terminating such a state of things.

What the letter from the official receiver had to do with the legal right of the standing joint committee to discontinue Kinchant's pension I do not understand, though it was but natural that a body of gentlemen like the committee should refer to it when seeking advice from the Home Office.

[The Lord Justice then read the letter from the Home Office of April 13, 1893, and resumed:—]

It is not for me to criticise this advice, nor should I allude to it, except that, in adjudicating upon this case, I am forced to do so, and I must say that if what the police authority subsequently did upon July 12, 1894, was to order Kinchant over here, not in reality for the purpose of examining him to see if his incapacity had ceased, but for the purpose of supporting the Court of Bankruptcy, or, indeed, for any purpose other than that of satisfying themselves that he was no longer incapaci-

tated, then what the committee did upon July 12, 1894, was without jurisdiction, and cannot be upheld in a court of law.

It appears to me that the only power conferred upon a police authority under the Act of 1890, s. 5, sub-ss. 3, 4, and 7, to require a pensioner to submit himself to examination is for the purpose of satisfying themselves as to his continued incapacity, and, if the order is made for some other purpose, then the authority have exceeded their jurisdiction; they have used the provisions of the statute for purposes not authorized by it, and the pensioner is not bound to comply with a requisition which is made without jurisdiction.

I agree that when an order for examination is made by a standing joint committee and it is not obeyed, it lies upon the pensioner who disobeys it to establish that the order was made without jurisdiction. The onus is upon him, and the question is, has the applicant in the present case satisfied that onus?

Upon the receipt of the letter from the Home Office the committee on April 17, 1893, resolved, by the votes of twenty-one to four, that they were satisfied by the evidence of Dr. Rankin that Kinchant's incapacity to serve again continued. This, it will be noticed, was a month after the committee were aware of the examination by Dr. Rankin upon the evening of March 3 at Mr. Sanderson's house at Leamington. They also resolved to pay his pension due on March 25, 1893. But, although the committee resolved as above, they at the same time also resolved that Mr. Kinchant be required to present himself at the county police building headquarters in Warwick on Monday, June 12 next, between the hours of 1 and 3 P.M., for examination as to the state of his health by two medical practitioners to be selected by the committee, failing which his pension was to be cancelled, and Dr. Rankin and Dr. Bullock were selected as such practitioners.

Why was the last resolution come to? For what purpose was Kinchant then summoned from Cintra to the headquarters of the police at Warwick upon a named day between specific hours when the committee were satisfied, as by their own resolution they shew that they were, that Kinchant's incapacity to serve still continued? There is but one answer, and that is

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that the committee did not summon him to satisfy themselves as to his incapacity—of this they were satisfied—but they summoned him as the Home Office letter had pointed out they should, and to assist the Court of Bankruptcy, and so, if possible, put an end to what the Home Office subsequently described as a scandal in the force.

[The Lord Justice then resumed, and concluded his statement of the facts of the case, and continued as follows:—]

I need not proceed further with a narrative in detail of the facts subsequent to this date: it is sufficient to state that Kinchant did not appear to be examined upon August 31, 1894. He, in my opinion, refused to obey the order, and the committee upon this ground refused to continue to pay him his pension, and it remains unpaid; and hence the present application by way of mandamus. I have pointed out that it is manifest upon the joint committee's own documents that the order for medical examination of Kinchant of April 17, 1893, was made without jurisdiction, it not having been made for the purpose authorized by the Act.

Then what had occurred between April 17, 1893, and July 12, 1894, to alter the position of matters? I have searched in vain through the documents in this case for any evidence or suggestion of any altered condition for the better in Mr. Kinchant's health. I can find none. It is true that fifteen months had elapsed; but I find, during that period, the certificate of Dr. Lahmeyer of March 29, 1894, above alluded to, as to his being then unfit for any sort of work. I find that upon April 16, 1894, the standing joint committee cancelled their order of April 17, 1893, for his attendance at Warwick; and I also find that in a case stated by the committee in July, 1894, for Mr. Poland's advice, it is not even suggested that Mr. Kinchant might have improved in health so as to be fit for duty, and, what is also very remarkable, not even a suggestion that the committee thought that he was.

The truth is, the standing joint committee upon July 12, 1894, never thought, any more than they did upon April 17, 1893, that Kinchant's incapacity for duty had ceased, and that he was fit to undertake the office of chief constable; and it

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is untrue to now say that they did or required satisfying upon the point. What they did think, and I have no doubt bonâ fide and honestly thought, was that they would be acting within their jurisdiction and doing what was right if they followed the advice given to them by the Home Office, and that they did follow it, and so have been led to act in excess of their jurisdiction. [The Lord Justice then reviewed the evidence given by certain members of the standing joint committee, and continued:—]

In my judgment, the applicant has established that the order for the examination of Kinchant contained in the resolution of July 12, 1894, was made by the committee, not really for the purpose of examining him as to the state of his health, but in order to carry out the advice of the Home Office, and, consequently, was made without jurisdiction. Kinchant, therefore, was not bound to obey it, and, his pension having been forfeited for such disobedience, the mandamus should go, this being the only remedy Kinchant has whereby to obtain continued payment of the pension of which he has been illegally deprived.

There is also another ground upon which, in my judgment, the order to submit to medical examination contained in the resolution of July 12, 1894, is invalid. Sect. 5, sub-s. 4, of the Police Act, 1890, enacts that, "In the event of the incapacity ceasing . . . . the police authority may cancel his pension and require him to serve again in the police force in a rank not less than the rank which he held before his retirement, and at a rate of pay not less than the rate which he received before his retirement." The latter part of this section was clearly inserted in favour of the officer in this respect—that if the incapacity ceased, although the committee might (the word is "may") cancel his pension, yet if they did so they were to give him the option of serving again in the force in a rank not less than he had hitherto served and at no less pay, so that the officer might not be cast adrift. In this case the committee by their resolution of July 12, 1894, have given Kinchant no such option. They have ordered him to attend and be medically examined upon August 31, 1894, and failing submission to such examination his pension to be cancelled and his name to be struck off the list of

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pensioners. I may add, though I do not think that it is material to the point in hand, that it seems that the order was advisedly made in the form it was without giving Kinchant the option of returning to the force, for Mr. Poland had pointed out to the committee that they could not desire to reinstate a man of broken health or a man, whatever might be the state of his health, who was an undischarged bankrupt, in the office of chief constable of Warwickshire—and indeed this is obvious. So the committee determined not to give Kinchant the offer of reinstatement; and in my judgment the order is, therefore, bad upon its face, for the statute enacts that they shall.

It was also argued, on the applicant's behalf, that the order was bad, because it named time and place for Kinchant's examination, and it was said that the committee had no power to name the one nor the other, and that it was for the pensioner to prescribe when and where the examination should take place. I do not so read the Act. Nothing is said about time or place of examination in it; but it will be seen (s. 5) that, before granting a pension upon the ground of incapacity, the police authority are to be satisfied by the evidence of some legally qualified medical practitioner selected by them that the proposed person is incapacitated. Who then in such a case is to appoint time and place for this necessary examination by the medical practitioner selected by the authority? Can it be said that the proposed pensioner is the person to say when and where the examination shall take place, and thus compel the medical practitioner selected by the police authority to go to him whenever and wherever he may choose? This construction of the statute appears to me to be unreasonable and untenable. So again (see sub-s. 7), if a pensioner fails or refuses when required by the police authority to be examined by some legally qualified medical practitioner selected by them, they may deal with the pensioner in the prescribed manner. Is it to be said that, although the police authority can require the pensioner to be examined by their selected medical practitioner to satisfy them that the incapacity continues, yet neither the authority nor the practitioner, but only the pensioner, can name the time and place for such examination? I think not.

It appears to me that the true reading of the statute is that the police authority or the medical practitioner has jurisdiction to name time and place in order to give effect to the order for examination. The direction as to time and place is not the substantial part of the order for examination, and if Kinchant had attended for examination and been examined, although not at the time and place indicated, he could not have been treated as disobeying the order. The introduction into the order of a time and place does not vitiate it. I agree with Cave J. in thinking that the authority has not been exceeded in this particular, and if the case had rested upon this point I should have said a mandamus ought not to go.

But for the other reasons above stated I think that the mandamus should go, which was the opinion of Wills J., although he, I think, attached too much importance to the form of the order, and that the appeal must be allowed, with costs to the applicant here and below, the judgment of the Queen's Bench Division, by reason of Wills J. having withdrawn his judgment, being that the mandamus should be refused.

LINDLEY L.J. I have had an opportunity of reading the judgment which has been delivered by the Lord Justice, and I entirely concur in it.

Appeal allowed.

Solicitors: *G. Perrott Smith; Field & Roscoe, for Field, Leamington.*

W. W. K.

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Banker—Cheque—Forged Indorsement—"Customer"—Action for Conversion—Liability of Banker—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 24, 60, 79 *sub-s.* 2, 80, 82.

The defendant bank carried on business in London and had a branch in Paris. A cheque was drawn on the defendant bank in London in favour of the plaintiffs specially indorsed by the plaintiffs to a firm in London and posted for collection to that firm, but it never reached them. After the posting a forged indorsement was put on the cheque, and it was presented at the defendants' bank in Paris by a person, purporting to be the last indorsee, who had no account at the defendants' bank. The defendants paid the cheque, and sent it to their bank in London, who credited their bank in Paris with the value. The London bank refused to deliver the cheque to the plaintiffs. The cheque, when it reached the defendants, was crossed generally.

In an action for conversion of the cheque:—

Held, that the defendants, by paying the cheque, and forwarding it to their London bank, and crediting their Paris bank with the value, were guilty of a conversion of the cheque in England, and therefore the case was governed by English law; that the person who obtained payment of the cheque was not a "customer" of the defendants, within the meaning of the Bills of Exchange Act, 1882, s. 82; that the defendants, having paid the cheque on a forged indorsement, were not protected by any of the provisions of the Bills of Exchange Act, but were liable, under s. 24, for the value of the cheque.

Kleinwort, Sons & Co. v. *Comptoir National d'Escompte de Paris*, [1894] 2 Q. B. 157, followed.

Action tried in the Commercial Court before Collins J. without a jury.

The plaintiffs claimed in respect of the alleged conversion by the defendants of two cheques, one for 600*l.* and the other for 81*l.* 4*s.* 11*d.*

The admitted facts were as follows:—

The cheque for 600*l.* was drawn on the Crédit Lyonnais in London in favour of the plaintiffs. It was indorsed by the plaintiffs: "Pay to the order of Messrs. C. J. Hambro & Son value in account. Cadiz, the 2nd August, 1895" (signed on behalf of the plaintiffs). It was duly posted by the plaintiffs from Cadiz to C. J. Hambro & Son in London inclosed in an envelope with the other draft in question. It was so inclosed and posted to Messrs. Hambro for collection on behalf of the plaintiffs. It never reached the hands of Messrs. Hambro.

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After the draft had been posted the indorsement of the plaintiffs was altered without the authority of the plaintiffs to the form in which it now appears on the draft, and the name of C. J. Hambro & Son was obliterated. The indorsement by the Bank of Villanueva was forged. The draft was brought with the other draft to the defendants' bank in Paris by a person who purported to be Pascual Mata Ponce, the last indorsee at that time on the draft. The Crédit Lyonnais in Paris received the draft for collection, and, having collected the proceeds, paid such proceeds to Pascual Mata Ponce in Paris. The defendants' bank in Paris indorsed the draft and stamped it "Guichet d'Escompte," and appended the note "Sans Compte de retour" to their indorsement. The defendants' bank in Paris transmitted the draft to their bank in London. The defendants' bank in London credited their bank in Paris with the value of the draft. The defendants' bank in London now hold the draft, and have refused to deliver it up to the plaintiffs or their agents on demand. The draft when it reached the hands of the defendants was crossed "—— and Co."

French advocates were called on behalf of the defendants to prove that by French law crossed cheques were not recognised. The effect of this evidence is more fully stated in the judgment. (1)

Nov. 11, 12. *Joseph Walton, Q.C.*, and *E. Forbes Lankester*, for the plaintiffs. The facts shew a conversion of both bills in England, and the defendants are not protected by any of the provisions of the Bills of Exchange Act. (2) The case is

(1) Post, p. 155, et seq.

(2) By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 24, "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

"Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery."

By s. 60, "When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the

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governed by the decision of Cave J. in *Kleinwort, Sons & Co.* v. *Comptoir National d'Escompte de Paris.* (1) The defendants cannot properly be treated as two separate and distinct banks; and, if that is so, they are liable by virtue of s. 24, and are not protected by s. 60, for the payment was not made in the ordinary course of business. Assuming, however, that the defendants can be regarded as two banks, even so the French bank would not be within the protection of s. 60. Similarly, s. 80 cannot apply if there are not two banks; but, if there are two banks, that section can only protect the bank on which the cheque was drawn, and therefore can have no operation to protect the French bank. In any case there was a conversion by the French bank in receiving payment in England, and therefore the transaction must be governed by English law, and the defendants are liable. Sect. 82 also cannot help the defendants unless there are two banks, and in any case it cannot protect them unless they received payment for a customer; and it is clear in the present case that Ponce was not a

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ordinary course of business, it is not incumbent on the banker to shew that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority."

By s. 79, sub-s. 2, "Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid."

By s. 80, "Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

By s. 82, "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

(1) [1894] 2 Q. B. 157.

customer of the defendants, for it is not shewn that he had any account at their bank. The defendants did not pay either of the cheques in the ordinary course of business within the meaning of s. 60.

[They also referred to *Bissell & Co.* v. *Fox Brothers & Co.* (1)]

Sir Robert Reid, Q.C. (*English Harrison* with him), for the defendants. In the face of the decision in *Kleinwort, Sons & Co.* v. *Comptoir National d'Escompte de Paris* (2) it is impossible to contend that the defendants can succeed in this Court as to the draft for 81*l.* 4*s.* 11*d.* The draft for 600*l.*, however, stands on a different footing, and as to that the defendants are not liable. So far as the transaction took place in France, the French law would prevail, and as the evidence shews that the French law does not recognise the crossing of cheques, the defendants are not liable. If the English law governs the case, the defendants paid the draft in good faith, and in the ordinary course of business, and are therefore protected by s. 60 of the Bills of Exchange Act, 1882, and s. 79, sub-s. 2, does not take away that protection. The payment by the bank in England was made to a banker, for it was made to the Paris bank, and therefore is protected by s. 80, and s. 79, sub-s. 2, does not render such payment wrongful, being made to a branch of the defendants' own bank. The Act does not anywhere provide that the payment, in order to be protected, must be to a different banker. The defendants are protected by s. 82 if, in good faith and without negligence, they received payment for a customer. There is nothing to shew want of good faith or negligence, but it is contended that Ponce was not a customer of the defendants, because he had no account at their bank. As to this point it must be admitted that the case of *Matthews* v. *Brown & Co.* (3) seems to be unfavourable to the defendants' contention, but, though the judgment may be right, it is submitted that some of the dicta in that case go too far. The presentation of the cheque by the French branch of the bank at the English branch does not amount to a

(1) (1884) 51 L. T. (N.S.) 663; varied in the Court of Appeal (1885) 53 L. T. (N.S.) 193.

(2) [1894] 2 Q. B. 157.

(3) (1894) 10 Times Rep. 386; 63 L. J. (Q.B.) 494.

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conversion in England. [He also referred to *Ogden* v. *Benas*. (1)]

Lankester, in reply. As to conversion in England, it is clear that, if the French branch had sent the cheque to England by a special messenger, to be presented at the English branch, when the messenger arrived in England he would have had no right to the cheque, as against the true owner, and the presentation would have been a conversion. It can make no difference that the act was carried out through the medium of the Post Office.

Cur. adv. vult.

1896. Nov. 19. Judgment was delivered by

COLLINS J. This is an action brought by Lacave & Co. against the Crédit Lyonnais upon two drafts, one of them for 600*l.*, the other for 81*l.* 4*s.* 11*d.*, of which Lacave & Co. are admitted to be the true owners. They allege that in each case the defendants have converted those drafts, and are responsible to them for the value. Now as to the smaller one, for 81*l.* 4*s.* 11*d.*, Sir Robert Reid admitted that the case comes directly within the authority of *Kleinwort, Sons & Co.* v. *Comptoir National d'Escompte de Paris* (2), decided by Cave J., and as to that no controversy arises, and there must be judgment for the plaintiffs.

But the real controversy is raised as to the other draft, for 600*l.*, and it is necessary to examine in some detail the particular facts under which the claim arises upon that draft. The facts were ascertained by admissions, and they are shortly stated therein. [The learned judge read the admissions of fact, which are set out ante, pp. 148, 149.]

Now, these facts raise all the points necessary to be considered in determining whether there is or is not a liability to make good as against the defendants. It is perfectly clear law under s. 24 of the Bills of Exchange Act, which simply declares the law as it theretofore existed, that the title of the true owner of the bill is not defeated by a forged indorsement, unless there is some protection for a person taking under a forged indorse-

(1) (1874) L. R. 9 C. P. 513.

(2) [1894] 2 Q. B. 157.

ment by some provision, either in the English law, if we are dealing with an English cause of action, or in the French law, if we are dealing with a French cause of action. Sect. 24 of the Bills of Exchange Act is as follows. [The learned judge read s. 24.]

Therefore primâ facie we have here the true owner of a cheque, which has been passed after a forged indorsement, and therefore primâ facie, unless we can find some protection in the other sections of the Act, or in the French law, a liability is thrown upon the defendants. Now the defendants contend that, as to all the parts of their conduct which took place in England, they are protected by the English law, by the law dealing with crossed cheques, which I will refer to in a moment.

As to that part of their conduct which took place in France, if and in so far as any cause of action is grounded thereon, they say that they are protected by the French law. It is necessary therefore to consider whether all the acts done in England are protected by English law, and whether all the acts done in France are protected by French law.

First of all, I will consider the case with respect to English law and what was done in England.

The cheque, as I have pointed out, was crossed, and it was drawn on the Crédit Lyonnais, 40, Lombard Street, London, and the defendants say that, so far as their conduct is impugned by reason of their having cashed or paid in London a cheque, crossed, and so drawn on them, and coming to them from another bank, they are within the protection of the 80th section of the Bills of Exchange Act, which is as follows: "Where the banker on whom a crossed cheque is drawn"—that is the position of the defendants in this case, so far as their action here in London is concerned—"in good faith and without negligence pays it, if crossed generally,"—that is the case here—"to a banker"—— [The learned judge read the remainder of s. 80.]

Now the bank in London say, "If and so far as you are charging us with converting this cheque, in that we have paid it to another bank, we are protected by the 80th section. We

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are the bank on whom the cheque was drawn. It was a crossed cheque, and therefore, whether it came to us with or without a forged indorsement, we are placed, by reason of what we have done, in the same position as if we had paid it to the true owner thereof."

Then we have to see whether there is any other part of the conduct of the defendants which can be made the subject-matter of an action in England. That obliges us to look at the other various stages of the transaction. The cheque, we have seen, was brought to the Paris branch of the defendants' bank by one Ponce. Ponce was not a customer of that bank. It was received by them from him for the purpose of collection, and after an interval of two or three days, in which time they sent the cheque to London, and there received payment by an entry in the books, and received then an intimation from the London bank apprising them of the fact that the cheque was a good one, they then, and not until then, paid Ponce the amount. That being so, it is quite clear that, if this transaction had taken place in England, the collecting bank—that is, the Paris branch—would have had no defence to the action, and, inasmuch as the Paris branch and the head office are all one bank for the purpose of this action—all represented by one defendant—the defendants, if they relied on English law to justify what was done in Paris, would fail, because they do not come within the protection of the 82nd section, which is the section of the Act which deals with the position of the collecting bank upon a crossed cheque. [The learned judge read s. 82.]

Now, I am clearly of opinion on the facts that Ponce was not a customer of the bank. Sir Robert Reid contended that the section could not be taken to limit the protection to the case of the cheque being collected for a customer in the ordinary sense, that is a person who kept an account at the bank. He says, "the customer" must be used in a larger sense of the word, and, practically, as far as I could see, must be taken to mean any one. I cannot see any dividing line between a person who has an account and any one who chooses to come with a cheque and ask the bank to collect it for him. Sir Robert Reid contended that it must have that larger meaning.

He admitted that if it had not that larger meaning, Ponce could not be brought within the definition of "customer." He called the attention of the Court to a decision which undoubtedly decided that no one but a customer in the proper sense of the word, a person having an account at the bank, would be entitled to the benefit of the section. That is the case of *Matthews* v. *Brown & Co.* (1), decided in the year 1894. I do not think it would have required the authority of that decision to convince me that the Act means what it says, and that protection is only given for obvious reasons to a bank which does collect for a customer in the real sense, if he is a person who has an account at the bank—at all events, if he is a person whose relations are much nearer and closer than those of Ponce in this case.

Therefore, if the acts done by the bank, taking them as a whole, had all taken place in England, there is no doubt whatever that they would stand unprotected by any provisions in the Bills of Exchange Act in respect of what was done by the collecting bank.

The defendants, however, conceding that this would not be protected if done in England, say it is protected by the law of France, and evidence was called before me to prove that crossed cheques are not recognised in France at all; that it is entirely within the French law for a bank, to whom a crossed cheque is presented for collection, to collect it, and, having collected it from the bank on which it is drawn, to pay it to any person who comes with it, although that person claims under a forged indorsement. That, I am told, is the law of France, and it is said that if what the French bank did in Paris was the only subject-matter of action here, that would be protected by the French law; they did no wrong according to the French law, and therefore were under no liability in England for that part of their conduct.

That obliges me to analyze what the acts were which resulted in the money being handed over the counter to Ponce in Paris. Those acts were obviously not limited to Paris. The cheque was presented in Paris for collection. Collection had to be

(1) 10 Times Rep. 386; 63 L. J. (Q.B.) 494.

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obtained by acts done partly in Paris and partly in England, and as soon as the person carrying out these acts—if I may assume they were all carried out by one person for the collecting bank—crossed the Channel, and landed at Dover (I will assume he came by the shortest route), he then comes under the English law, and anything done by him after that must be justified, if at all, by English law. He does not carry the French law with him beyond the English coast. Upon that I entirely yield to the very able and conclusive argument that Mr. Lankester addressed to me in reply in this case. I do not think the immunity of French law extended beyond the English Channel. But that is not conclusive of the matter. We have to look to see whether any acts were done in England for the purpose of carrying out that which was legitimate by French law—whether any acts were done in England which stand unprotected by the English law, and are in themselves a legal wrong in England. Mr. Lankester put it that we must test the case as if the bank in Paris consisted of one individual, and as if that individual had to carry out himself personally the complicated transaction which was in fact carried out through the medium of the post and the cross-entries made in the books of the bank. What under those circumstances would he have to do? He would have to come with the plaintiff's cheque across the Channel and land at Dover. He would have to proceed from Dover to London for the purpose of cashing, for a person who was not the true owner, a cheque belonging to the true owner. Had the true owner interrupted him after he had got half a mile from Dover, and said, "I think you have got a cheque which belongs to me; hand it back to me," what would have been his answer? "The French law entitles me to collect this cheque and give the proceeds to a thief." I think the answer to that would be, "But for the moment you are in England, and in England the English law does not suffer you to keep, on behalf of a thief, that which belongs to me, neither does it suffer you to deal with it for the thief, and therefore in proceeding to invite payment of my cheque from the bank on which it is drawn in London, you are interfering with my dominion over the cheque, which by English law is not legal.

Further, if you receive payment, as in my judgment you do if you assent to any cross-entry in an account in London being deemed to be payment to you of that amount, you not only present it for payment, but you would receive payment in England, and in both those things you have committed what amounts to conversion in English law. If so, you stand unprotected by the English law; you carry with you no protection from the French law; and therefore you are liable for conversion in England." These acts are done by the French bank, and whether they do it by travelling over here and doing it in person, or execute it by the intermediary of third persons, it is still their act, and I have to see whether, according to the English law, that transaction amounts to conversion. Upon that I shall refer to the case of *Kleinwort, Sons & Co.* v. *Comptoir National d'Escompte de Paris* (1) as a distinct authority. It is based on the authority of an earlier decision of the full Court of Common Pleas in the case of *Arnold* v. *Cheque Bank*. (2) Cave J. says in *Kleinwort, Sons & Co.* v. *Comptoir National d'Escompte de Paris* (1): "It was submitted that there was no conversion by the defendants. . . . Particular stress was laid upon Lord Coleridge's judgment in the former case" (that is *Arnold* v. *Cheque Bank* (2)), "in which he says, 'The question here is whether what was done by the defendants amounted to a conversion of the bill; and we are of opinion that it did. Payment of the draft was actually obtained by the defendants from Smith, Payne & Smith'"—that is to say, the defendants in the case claimed payment of a draft which belonged to the plaintiff from a bank on whom it was drawn. In obtaining payment of that cheque they were obtaining payment for a person who was not the true owner of the cheque. It goes on to say: "'The next step in dealing with the money was not simply to hand it over to Mrs. Chandler, but to retain it and open an account with her, the effect of which was to appropriate it to their own use as a loan from Mrs. Chandler.'" (3) Then Cave J. goes on: "It was contended that in this case the defendants simply handed over

(1) [1894] 2 Q. B. 157. (2) (1876) 1 C. P. D. 578.
(3) 1 C. P. D. at p. 585.

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the money to Federico Sanromá, and did not open any account with him. But in my judgment Lord Coleridge only made use of the expressions relied on in answer to the objection that the bank got nothing by the transaction. I do not think it is necessary to shew that the bank made any profit by the transaction, although in fact in this case they did make a charge for it. It is clear from *Fine Art Society* v. *Union Bank of London* (1) that the defendants, in presenting the draft and obtaining the money, were guilty of a conversion, inasmuch as they presented it and obtained the money, not for the plaintiffs, but for the stranger, who handed them the draft, and who had no title whatever to it." (2) When the acts done by the French branch are analyzed, they do contain in them the presenting of the draft and the obtaining of the money, not for the true owner, but for a stranger, who had no title whatever to it, and therefore there is clear authority. I think the decision of Cave J. is well based upon the authorities that he there cites, and there is also the high authority of his own opinion.

Therefore in my judgment this case must be decided in favour of the plaintiffs, and they must have judgment for the amount claimed, with costs, and interest at 4 per cent. from September 12, 1895, the date on which the plaintiffs wrote informing the defendants that the drafts had been stolen.

Judgment for the plaintiffs.

Solicitors for plaintiffs : *Cheston & Sons.*

Solicitors for defendants : *Harwood & Stephenson.*

(1) (1886) 17 Q. B. D. 705. (2) [1894] 2 Q. B. at p. 158.

P. B. H.

THORPE, Appellant v. PRIESTNALL, Respondent. 1896 Dec. 7.

Justices—Practice — Information—Institution of Prosecution — Consent in writing of Chief Constable—Sunday Observance Act, 1676 (29 *Car.* 2, *c.* 7), *s.* 1—*Sunday Observance Prosecution Act*, 1871 (34 & 35 *Vict. c.* 87), *s.* 1.

By the Sunday Observance Prosecution Act, 1871, "No prosecution . . . . shall be instituted . . . . for any offence . . . . under" the Sunday Observance Act, 1676 . . . . "except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed. . . ."

The appellant was convicted under the Sunday Observance Act. The chief constable gave a verbal consent before the information was laid, and gave consent in writing after the information was laid and the summons issued:—

Held, that the prosecution was instituted when the information was laid, and therefore was not instituted with the consent in writing of the chief constable, and the conviction was bad.

Case stated by the police magistrate for the city of Sheffield.

The information, dated July 6, 1896, stated that the appellant, on July 5, 1896, being a tradesman or artificer, unlawfully did exercise the business or work of his ordinary calling upon the Lord's Day, contrary to the form of the statute, &c.

The summons, issued on July 6, stated the alleged offence in the same terms as the information, and called on the appellant to appear on July 15.

The summons was served personally on July 7.

The information was laid under 29 Car. 2, c. 7, and the following is a copy of a consent to proceedings being taken, which was given in pursuance of 34 & 35 Vict. c. 87, s. 1:—

"In pursuance of 34 & 35 Vict. c. 87, s. 1, I hereby consent to proceedings being commenced by" the respondent against the appellant "for an alleged offence committed by him under the Act 29 Car. 2, c. 7.

"Dated this 6th day of July, 1896.

"J. Jackson,

"Chief Constable for the City of Sheffield."

The case came on for hearing on July 15, when it appeared,

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as to the consent to proceedings, dated July 6, that the chief constable was asked for his consent on July 6, and gave it, and expected the written document would have been brought to him at once, but it was not, and it was signed on the morning of July 7.

Objection was taken, for the appellant, on the ground that the consent required had not been duly given, but the magistrate considered that it had been sufficiently well given, and refused to stop the case, and convicted the appellant.

For the appellant the contention was—that by 34 & 35 Vict. c. 87, s. 1, no prosecution shall be instituted under 29 Car. 2, c. 7, except by or with the consent in writing of the chief constable; that in this case the information and summons were laid and issued respectively on July 6, on which date the chief constable had only given verbal consent to the institution of the proceedings; that on July 7, the day after the institution of the proceedings, the consent in writing was given, and that such consent, although given on that date, was dated back to the previous day, in order, it was suggested, to remedy what would be an apparent defect in the proceedings.

For the respondent it was contended—that the consent of the chief constable was asked for and obtained verbally on July 6, and although the same was not given in writing before July 7, the full intent and meaning of the Act had been complied with. (1)

The question for the opinion of the Court was whether, in the face of the objection made, it was right or wrong to convict the appellant.

Brooke Little, for the appellant. The conviction is bad, for it was not instituted with the consent in writing of the chief constable, within the meaning of the Sunday Observance Prosecution Act, 1871. (2) The words "no prosecution shall

(1) Other questions were stated in the case, but as to these no decision was given.

(2) 34 & 35 Vict. c. 87. By s. 1, "No prosecution or other proceeding shall be instituted against any person or the property of any person for any offence committed by him under" the Sunday Observance Act, 1676 (29 Car. 2, c. 7), "or for the recovery of any forfeiture or penalty for any such offence, except by or with the consent

be instituted" in that Act mean the same as "shall be commenced," and the prosecution is instituted as soon as the information is laid. Here no consent in writing was given until after the information had been laid, and therefore a condition precedent expressly required by the Act was not complied with. The appellant's contention is supported by the provision of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, limiting the time for laying informations to within six months from the time when the matter of the information arose, and of the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 80, prohibiting the commencement of proceedings or prosecutions for offences included in that section without the sanction of the Attorney-General. In the case of *In re Gallard, Ex parte Gallard* (1), decided on rule 317 of the Bankruptcy Rules, 1886, which provides that no member of a committee of inspection shall, "except under and with the sanction of the Court," receive profit from any transaction arising out of the bankruptcy, the Court of Appeal held that the sanction could not be given after the profit had been derived.

Danckwerts, for the respondent. The conviction is good. The important matter is the consent, which is only required to be in writing for the purpose of evidence. It is immaterial, therefore, at what date the consent is put into writing. "Instituted" does not mean the same as "commenced," as is shewn by the definitions in Johnson's and Latham's Dictionaries. The words of the other statutes which have been referred to are different. The commencement of proceedings is the service of the summons or citation: *Ditcher* v. *Denison*. (2) In *Yates* v. *Reg.* (3) Brett M.R. said: "For my own part I consider that laying the information before the magistrate would not be the commencement of the prosecution,

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in writing of the chief officer of police of the police district in which the offence is committed, or with the consent in writing of two justices of the peace or a stipendiary magistrate having jurisdiction in the place where such offence is committed."

By s. 2 and the schedule, "Chief Officer of Police" means, in any borough, the chief constable.

(1) [1896] 1 Q. B. 68.

(2) (1857) 11 Moore's P. C. 324.

(3) (1885) 14 Q. B. D. 648.

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because the magistrate might refuse to grant a summons, and if no summons, how could it be said that a prosecution against any one ever commenced?" (1) The opinion of Cotton L.J. was to the same effect. (2) The decision in *In re Gallard, Ex parte Gallard* (3), turns entirely on the word "under."

Brooke Little, in reply, referred to *Egginton* v. *Pearl*. (4)

WILLS J. I am of opinion that the appellant must succeed, and the conviction must be quashed. On looking at the words of the Sunday Observance Prosecution Act, 1871 (34 & 35 Vict. c. 87), s. 1, it is clear that the institution of a prosecution is something which may be done by the chief constable as well as with his consent. The chief constable cannot grant a summons, nor when a summons is once granted has he any discretion to exercise as to whether it shall be served or not. Neither of those things, therefore, is the institution of the prosecution, which *is* a matter within his discretion. The institution of the prosecution must, therefore, be the laying of the information. I do not think that any distinction can properly be drawn between the words "institute" and "commence." The passages in the judgments in *Yates* v. *Reg.* (5), which were relied upon in support of the conviction, only amount to dicta, for the decision in that case related to a prosecution for libel by a criminal information filed by order of the Court. It may be that the magistrate does not act upon the information, and in that case no prosecution follows, and there is nothing to which the phrase "commencement of a prosecution" is applicable. But where there is a prosecution, I cannot see any reason why the laying of the information (which started it) is not the commencement of the prosecution; and I certainly think this has been the meaning of the phrase commonly accepted in the profession. This view is further supported by the provision in the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, by which a period of six months from the time when the matter of the complaint or information arose is fixed for making the complaint or laying the information.

(1) 14 Q. B. D. at p. 657.
(2) 14 Q. B. D. at p. 661.
(3) [1896] 1 Q. B. 68.
(4) (1875) 33 L. T. (N.S.) 428.
(5) 14 Q. B. D. 648.

WRIGHT J. I am of the same opinion. No step can be taken in cases to which the Sunday Observance Prosecution Act, 1871, applies, except by or with the consent in writing of the chief officer of police, or with the consent of magistrates. In *Rex* v. *Wallace* (1), "the judges, at a conference, unanimously held that the information and proceeding before the magistrate was the commencement of the prosecution, within the meaning of the Act," 8 & 9 Will. 3, c. 26, s. 9, which provided that no prosecution should be made for any offence against that Act, unless such *prosecution be commenced* within three months next after such offence committed. The case of *Reg.* v. *Brooks* (2) is to the same effect, though not so satisfactory, for there the fifteen judges, after holding that the prosecution was commenced by the information and warrants to apprehend, appear to have added the words, "or at all events by the apprehension of the prisoners." The case of *Rex* v. *Wallace* (1), however, is a sufficient authority for the view which we have adopted.

Conviction quashed.

Solicitors for appellant: *Campion & Simmons, for Arnold Muir Wilson, Sheffield.*

Solicitors for respondent: *Aldous & Welfare.*

(1) (1797) 1 East, P. C. 186. (2) (1847) 2 C. & K. 402.

P. B. H.

C. A. 1896 Dec. 9.

[IN THE COURT OF APPEAL.]

BOWLER *v.* THE BARBERTON DEVELOPMENT SYNDICATE, LIMITED.

Lord Mayor's Court—Prohibition—Cause of Action—Agreement to transfer Shares in Company to be formed—Action for Specific Performance—Proof of formation of Company—Company not registered within Jurisdiction.

The plaintiff brought an action on the equity side of the Mayor's Court of London for specific performance of an agreement to transfer to him a certain number of shares in a company to be formed, or in the alternative for damages exceeding 50*l*. The bill of complaint alleged the formation of the company, which, as appeared by the affidavits, had been registered in Scotland:—

Held, that proof of the formation of the company being a material part of the claim both for specific performance and for damages, the whole cause of action did not arise within the jurisdiction, and the defendants were entitled to a prohibition.

Appeal from an order of Bruce J., directing a writ of prohibition to issue to the mayor and aldermen of the City of London to prohibit them from proceeding further in an action pending in the Mayor's Court.

The action was brought, by bill of complaint on the equity side of the Mayor's Court, for specific performance of a contract under seal to transfer to the plaintiff fully paid shares of the nominal value of 6000*l*. in a company to be formed to acquire certain mining claims situate in South Africa, or in the alternative for damages. The bill of complaint alleged that a company called the Sheba Alliance, Limited, had been formed to acquire the claims. This company was registered in Scotland.

The learned judge ordered the issue of a writ of prohibition.

The plaintiff appealed.

1896. Oct. 27. *Scarlett*, for the plaintiff. Every material fact constituting the cause of action must be proved to have occurred within the jurisdiction of the Mayor's Court: *Cooke* v. *Gill*. (1) The registration of the company is not such a

(1) (1873) L. R. 8 C. P. 107.

material fact, for this is an action against the syndicate, and not against the company, and the agreement and the breach of it took place within the jurisdiction. The existence of the company can be proved otherwise than by evidence of registration.

Herbert Reed, Q.C. (*Arthur May* with him), for the defendants. This is an action for specific performance, and, as the company is not registered within the jurisdiction of the Mayor's Court, the relief asked for cannot take place within the jurisdiction, and prohibition ought to issue.

Cur. adv. vult.

1896. Dec. 9. The judgment of the Court (Lord Esher M.R., Lopes and Rigby L.JJ.) was read by

RIGBY L.J. This action is brought by the plaintiff, by bill of complaint on the equity side of the Mayor's Court, for the specific performance of a contract under seal, or in the alternative for damages. Damages could only be granted on its being shewn that the Court had jurisdiction to grant specific performance. The action is not one for damages for breach of the contract. It is clearly not within s. 12 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), whereby the jurisdiction was extended to cases where the debt or damage claimed in any action does not exceed 50*l.*, and the cause of action either wholly or in part arises within the jurisdiction.

The agreement sued upon is sufficiently stated in the bill of complaint as an agreement to transfer to the plaintiff fully paid shares of the nominal value of 6000*l.* in a company to be formed to acquire certain mining claims situate in the South African Republic. No court of equity could grant specific performance of such an agreement unless it were shewn that the company had in fact been formed.

As damages are only claimed and could only be given by a court of equity, acting as such, in lieu of specific performance, it follows that proof of formation of the company must be a material and essential part of the claim, both for specific performance and for damages.

Accordingly the plaintiff alleges in his bill of complaint that a company called the Sheba Alliance, Limited, has been formed

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to acquire the claims. There can be no doubt that the meaning of this allegation is that a company has been formed by registration with limited liability under the Companies Acts.

If the formation of the company were traversed, the material and essential fact of its formation could not be proved to have taken place within the jurisdiction. In other words, the whole cause of action did not arise within the City. On this ground of itself the writ ought to be granted.

It is unnecessary to consider any other grounds which may exist for granting the writ; and as they were not fully argued on either side, all such grounds may be left for decision in some case in which it may be necessary to decide them.

The appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Roberts & Wrightson.*
Solicitors for defendants: *Thompson & Thompson.*

A. M.

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Oct. 28;
Nov. 9.

THE COMMISSIONERS OF THE PORT OF LANCASTER *v.* THE OVERSEERS OF THE POOR OF THE PARISH OF BARROW-IN-FURNESS.

Poor-rate—Rateability—Lighthouse—Dues.

In assessing the rateable value of a lighthouse the dues received in respect of it cannot be taken into consideration.

CASE stated by the Court of Quarter Sessions for the County of Lancaster.

By 23 Geo. 2, c. xii., commissioners were appointed who were empowered to build a quay and wharf on the River Lune near the town of Lancaster, and to do all things requisite or necessary for improving the navigation of that river; and by 29 Geo. 3, c. xxxix., after reciting that the navigation of Lancaster Bay was extremely dangerous, and that the danger might be remedied or much lessened if a lighthouse or lighthouses were erected on some suitable eminence upon the coast of or

near to the bay, it was enacted that the commissioners might erect, build, or place one or more proper lighthouse or lighthouses, or other light or lights, with necessary buildings and conveniences, in any suitable place or places to be purchased by the commissioners, and also might remove the same and erect or place others in their room.

It was further enacted "that when any such lighthouse or other light shall be finished in such manner as to have the proper light and signals placed in and upon the same and so as to be serviceable not only to the ships and vessels bound to or from the port of Lancaster aforesaid but also to all other ships or vessels which shall or may trade, navigate, or sail across any part of the said bay usually called Lancaster Bay or into the River Duddon it shall and may be lawful to and for the said commissioners . . . . to demand, collect, receive, and take of and from the master, owner, agent, or consignee of every ship and other vessel which shall at any time pass by or make any such lighthouse or other light" certain rates and dues therein specified: "Provided always . . . . that if the said commissioners . . . . at any time after such erection of any such lighthouse or lighthouses or light or lights as aforesaid shall think fit to discontinue making all or any of the same serviceable in manner hereby required, it shall be lawful for the said commissioners . . . . so to do, and if all such lighthouses or lights shall be so discontinued the said light duties hereby granted shall no longer be payable but shall from thenceforth wholly cease and determine."

It was further enacted that the light duties when received should be applied by the commissioners "in sustaining such lighthouse or lighthouses or light or lights as aforesaid, and rendering the same serviceable, and in paying all such expenses as shall be requisite for that purpose, and if at any time or times there shall be any overplus money arising from the said light duties, such overplus shall be applicable and disposable by the said commissioners. . . . in such and the same manner and to and for such and the same interests and purposes" as had been directed by the former Acts in regard to port dues.

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It was also provided that during such time as the commissioners were entitled to receive the light duties they must keep and maintain in sufficient repair at least one lighthouse or light.

Subsequent Acts made provision for the expenditure of any overplus of light duties after paying the expenses and costs of maintenance of the lights.

The commissioners, more than 100 years ago, erected on Walney Island, in the parish of Barrow-in-Furness, a lighthouse under the before-mentioned enactments, and they have maintained it ever since, and have received in respect of it the authorized light duties. They have no power to let the lighthouse or to charge dues so as to make a pecuniary profit, or obtain any other direct profit. They are not compelled to exhibit any light from this particular lighthouse nor upon the particular piece of land, but can exhibit a light and earn the dues on any part of Walney Island, or, if they so desire, outside the limits of the parish of Barrow-in-Furness. The dues are paid by vessels in respect of other lights than the lighthouse in question, and part of them are received outside the parish of Barrow-in-Furness from vessels which never come within it.

In 1893 the lighthouse was assessed at a gross value of 10*l.* and a rateable value of 9*l.* per annum; but in 1895 the overseers of the parish of Barrow-in-Furness rated the lighthouse at a gross and rateable value of 2670*l.*

The commissioners appealed to quarter sessions, and the Court allowed the appeal and reduced the gross estimated valve to 74*l.* and the rateable value to 62*l.*, but stated this case.

The questions for the opinion of the Court were whether the dues received by the commissioners should be taken into consideration in arriving at the rateable value of the lighthouse, or whether the lighthouse ought to be rated on its structural value.

Lawson Walton, *Q.C.*, and *F. H. Mellor*, for the overseers. The dues must be taken into account in arriving at the rateable value of the lighthouse. They are earned by reason of the

commissioners' occupation of the lighthouse, and the proper method of rating it is to take the total amount of dues paid and deduct from it the expenses of working, maintenance, &c.

The question is what amount the commissioners would be prepared to give, as tenants, for the lighthouse with the right of collecting the dues and the duty of maintaining the light. That is the annual value of the lighthouse.

No doubt the whole of the dues received cannot be taken into account, as some are earned by the commissioners in respect of their other lighthouses, but some account must be taken of the dues which the commissioners receive in consequence of their ownership of this lighthouse.

The cases of *Rex* v. *Tynemouth* (1), *Rex* v. *Coke* (2), and *Mersey Docks and Harbour Board* v. *Overseers of Llaneilian* (3), have been overruled by *London County Council* v. *Churchwardens of Parish of Erith.* (4)

Littler, Q.C., and *Boyle*, for the commissioners. The decision of the court of quarter sessions was right. The overseers cannot take the dues into account, but must rate the lighthouse on its structural value. That is the only means by which the actual rental value of the lighthouse can be ascertained.

There is no necessity for the lighthouse being in this particular parish, and the dues are a toll in gross which cannot be rated: *Rex* v. *Fowke.* (5)

In *London County Council* v. *Churchwardens of Parish of Erith* (4) Lord Herschell only said that a lighthouse was capable of beneficial occupation and therefore rateable, but he did not intend to overrule the decisions that dues cannot be taken into account in rating a lighthouse.

Lawson Walton, Q.C., in reply, referred to *Reg.* v. *Kingston-upon-Hull Dock Co.* (6); *Blyth Harbour Commissioners* v. *Churchwardens of Newsham and South Blyth.* (7)

Cur. adv. vult.

(1) (1810) 12 East, 46.
(2) (1826) 5 B. & C. 797.
(3) (1884) 14 Q. B. D. 770.
(4) [1893] A. C. 562, at p. 591.
(5) (1827) 5 B. & C. 814.
(6) (1845) 7 Q. B. 2.
(7) [1894] 2 Q. B. 675.

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Nov. 9. GRANTHAM J. read the following judgment:—In this case very important issues are raised and very able arguments have been delivered by the learned counsel on both sides; but in my judgment no difficulty arises in determining those issues if we are content to be bound, as I think we are bound, by a long series of decisions more or less directly bearing on the questions in dispute, the decisions in those cases being founded on the true and only principle on which this matter can be treated, namely, that the land or premises must be rated on the letting value of that which is rateable irrespective of the particular profit or loss a particular occupier may make while occupying the rateable property, and that the rate must not be made on the profit (or on tolls where they are in the nature of profits) made or received as such by the persons in occupation. A better example could not be given than is to be found in the case of *Reg.* v. *London and North Western Ry. Co.* (1), where a line was held to be rateable on the rent it would fetch from the competition of three or four rival companies, although admittedly it was not worth that rent to the occupying tenant. And, again, in the case of *West Bromwich School Board* v. *Overseers of West Bromwich* (2), where it was held that although the school board could make no charge for the use of the school building, yet the building was liable to be rated at its fair value if it could be offered for hire.

The overseers, according to the case as presented to us, have boldly claimed to rate the dues—the gross amount of dues less expenses—quite irrespective of the letting value of the premises, namely, the lighthouse.

In my judgment they are wholly wrong in so doing, and my answer to this question is that the sessions were right in deciding that the dues were not rateable.

Mr. Lawson Walton, however, finding it impossible to uphold that contention, modified it by saying that his clients were entitled to apportion the dues, to reduce them in some way (though in what way or to what amount he could not tell us), and to rate the commissioners on that apportioned amount. What principle is there in that? None whatever, that I can see.

(1) (1874) L. R. 9 Q. B. 134. (2) (1884) 13 Q. B. D. 929.

He was obliged to contend that because a tenant or occupier makes or receives so much a year out of his business, therefore he would give that sum, or a distinct part of that sum, for the premises in which he carries on the business, irrespective of their cost or of their value. In other words, where there are two warehouses of equal structure and local value side by side, the one built and occupied by a pushing and successful merchant, while the other was built and occupied by an equally unsuccessful merchant, the rating of the two warehouses must be entirely different because the profits made in them are different. It is true that in the case of railways which pass through different parishes, sometimes with a station and sometimes without one, it is necessary to find out the profits of the whole line in order to find out how much the particular piece of line earns that runs through a particular parish; but here the attempt is made to claim the whole receipt of dues as profits belonging to the small spot on which the lighthouse is placed, whereas the dues are received for the use of the light over many miles of sea and by ships which never come near the particular piece of land in the parish of which the lighthouse forms an infinitesimal part. You might almost as well claim to rate the landing-stage from which a ship receives all her cargo for the whole profits the ship makes in carrying that cargo as to rate the amounts paid by the various ships which traverse the seas within the ambit of the locality included in the statutory area over which these dues can be claimed. *Rex* v. *Tynemouth* (1), *Rex* v. *Coke* (2), and *Rex* v. *Fowke* (3) are distinctly in point, and decide in terms that the dues claimed by a lighthouse are not rateable; and the only ground for the application to us to overrule those cases is to be found in the fact that Lord Herschell in the *Erith Case* (4) overruled in effect, if not in terms, the decision of the Court of Appeal in *Mersey Docks and Harbour Board* v. *Overseers of Llanelian* (5), and held that an occupier should be rated on the assumed letting value of the property although by statute the particular land was

(1) 12 East, 46.
(2) 5 B. & C. 797.
(3) 5 B. & C. 814.
(4) [1893] A. C. 562.
(5) 14 Q. B. D. 770.

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Grantham J.

struck with sterility in the hands of the occupier—the strongest argument, it seems to me, against the contention of Mr. Lawson Walton, instead of in favour of it, for it distinctly asserts that it is the letting value of the premises as such, and not the profits made by occupation of them, that is to be rated.

Although I never had any doubt as to this part of the case, I confess I had at first some doubts as to whether the commissioners were right in their contention that structural value must be taken as the basis of rating; but I come to the conclusion that you must adopt that principle, as there is no other principle on which you can base it. If you once open the door to asking how much the occupier would be likely to pay for the occupation because of the statutory dues or profits given him in connection with the use of the premises, you have no principle to work on, but it must be left to the individual opinion of the occupier or of the person for the time being having the right to answer the question.

The principle of structural value has been acted upon for many years in these cases, and I should be sorry to make that uncertain which at present is considered settled law.

For these reasons I hold that the sessions correctly determined that the lighthouse was to be rated on its structural cost and not on the amount received for dues by the Commissioners of the Port of Lancaster.

My brother Kennedy, who is unable to be present, has asked me to read the judgment which he has prepared.

KENNEDY J. In this case I have had an opportunity of reading the judgment of my brother Grantham, and as I concur in the conclusion at which he has arrived I need say little myself.

The court of quarter sessions decided that the dues which the commissioners are entitled to receive ought not to be taken into account in arriving at the rateable value of the lighthouse in question. Having regard to the facts which are stated in the special case, and especially that the commissioners have no power to charge dues or to let the lighthouse so as to make a pecuniary profit or obtain any direct profit, and that the com-

missioners are not compelled to exhibit any light from this particular lighthouse, nor upon this particular piece of land, but can exhibit a light and earn the dues on any part of Walney Island, or if they so desire outside the parochial limits, I cannot say that the decision of the court of quarter sessions upon this point is erroneous. It appears to be in accord with those judgments of the courts of law which are relevant to this matter. I refer especially to the case of *Rex* v. *Coke* (1), and to the cases there cited in the judgment of Bayley J., and to the case of *Rex* v. *Fowke* (2), which is set out in a note appended to the report. "The tolls do not arise from the building nor from anything of necessity connected with it": per Bayley J., *Rex* v. *Fowke*. (3)

There is a passage in the judgment of Lord Denman C.J. in the later case of *Reg.* v. *Kingston-upon-Hull Dock Co.* (4) which indicates the same view. The Lord Chief Justice is dealing with dock dues payable by ships which did not actually come into the company's docks: "The toll given to the company and which such ships are obliged to pay is doubtless given in respect of the company having made those docks; but still it does not arise from the use of the docks nor is it earned in them. It is a naked toll, just as much as toll paid by vessels passing lighthouses and in similar cases." (5)

I have been unable to find in any of the later cases cited or referred to in support of the overseers' case anything which judicially authorizes a different view. The language of Lord Herschell L.C. in the *Erith Case* (6) ought in my opinion to be read in close connection with the particular point as to the rating of a lighthouse dealt with in the case of the *Mersey Docks and Harbour Board* v. *Overseers of Llaneilian* (7), which his Lordship was reviewing. The question there as to the lighthouse was not how the rating should be calculated, but whether the lighthouse was rateable at all.

The court of quarter sessions has further held that the

(1) 5 B. & C. 797.
(2) 5 B. & C. 814.
(3) 5 B. & C. at p. 816.
(4) 7 Q. B. 2.
(5) 7 Q. B. at p. 26.
(6) [1893] A. C. 562, at p. 591.
(7) 14 Q. B. D. 770.

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lighthouse is to be rated on a "structural" basis—that is to say, it has held that a fair and proper mode of arriving at the rent at which the lighthouse might reasonably be expected to let is to take a percentage upon its value as a structure. I cannot say that it has been shewn that this decision was wrong. Suppose that the commissioners instead of being owners had to rent this house or another house for the exhibition of a light, would they reasonably be expected to offer to pay a rent fixed upon a different and higher basis? Even if perhaps, as in regard to some other matters in the law of rating, one might hesitate to say that the basis adopted by the court of quarter sessions is altogether satisfactory, no more satisfactory or just basis has in my judgment been suggested to us.

My judgment, therefore, on the question submitted to us in the special case, is for the commissioners.

Judgment for the commissioners.

Solicitors for commissioners: *Postlethwaite & Kendall, Barrow-in-Furness.*

Solicitor for overseers: *Frank Taylor, Barrow-in-Furness.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

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SMELTING COMPANY OF AUSTRALIA, LIMITED v. COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Conveyance on Sale—Colonial Patent — Licence to use Patent—"Property locally situate out of the United Kingdom"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

A share in a patent granted in New South Wales, and a sole licence to use in a district of that colony the invention protected by the patent, are "property" within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891, and do not come within the exception in that sub-section of "property locally situate out of the United Kingdom." An agreement made in England for the sale of such a share or licence is, therefore, liable to ad valorem stamp duty under that sub-section as though it were an actual conveyance on sale.

APPEAL from the judgment (1) of a Divisional Court (Pollock B. and Bruce J.) upon a special case stated by the Commissioners of Inland Revenue pursuant to 54 & 55 Vict. c. 39, s. 13.

The instrument presented for the opinion of the commissioners was an agreement under seal made and executed in England, bearing date August 1, 1895, and made between the Camden Syndicate, Limited, of the one part, and the appellants of the other part. The Camden Syndicate and the appellants were respectively companies incorporated under the Companies Acts, having registered offices and carrying on business in England. By the instrument it was agreed that the syndicate should sell and the appellants should purchase the rights and properties the particulars whereof were specified in the schedule thereto annexed, the consideration being fixed at 300,000*l.* to be paid partly in cash, and partly in shares. The appellants satisfied the commissioners that all the rights and properties mentioned in the schedule, except those secondly and thirdly therein mentioned, came within one or other of the exceptions

(1) [1896] 2 Q. B. 179.

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contained in s. 59, sub-s. 1, of the Stamp Act, 1891, and were therefore exempt from the duty imposed by the sub-section. The proportion of the consideration attributable to the rights and properties so exempt was 250,000*l.*, leaving the sum of 50,000*l.* attributable to the properties secondly and thirdly described. These last-mentioned rights and properties consisted of the benefit of a sole licence which had been granted to the syndicate to use in the Illawarra district of New South Wales the invention protected by a patent granted in New South Wales, subject to a royalty on every ton of ore treated under the invention, and also one equal half-share or interest in the said patent, and in all improvements thereof which might be thereafter patented by the owners thereof.

By an indenture, dated November 26, 1895, executed in Australia, the rights and properties secondly and thirdly described were assigned to the appellants. This indenture was stamped in accordance with the law of New South Wales with a stamp duty of 250*l.*, being colonial stamp duty on the consideration of 50,000*l.*

The commissioners were of opinion that the rights conferred by the patent and licence were respectively interests in property within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891, and that the appellants had failed to shew that the same came within any of the classes of property which under the terms of that sub-section were excepted from liability to duty thereunder. They therefore held that the instrument was chargeable under that section and sub-section with the duty chargeable under the head "Conveyance on Sale" in the first schedule to the Stamp Act, 1891, and assessed such duty at 250*l.*, being 5*s.* for every 50*l.* of 50,000*l.*, the portion of the total consideration which was attributable thereto. They were further of opinion that, in respect of the rights and properties other than those secondly and thirdly described, the instrument was liable to a duty of 10*s.* The appellants being dissatisfied with the assessment so far as regarded the duty of 250*l.*, required the commissioners to state a case.

The questions for the opinion of the Court were, whether the instrument was chargeable in accordance with the assess-

ment of the commissioners, and, if not, with what duty it was chargeable.

The Divisional Court gave judgment for the commissioners. (1)

A. T. Lawrence and *Leslie*, for the appellants. The agreement is not liable to ad valorem stamp duty under s. 59, sub-s. 1, of the Stamp Act, 1891. The enactment is intended to meet cases where no formal conveyance is contemplated subsequent to the agreement for sale. It was not intended that duty should be payable twice over in respect of one transfer of the same

(1) By the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59, sub-s. 1, "Any contract or agreement made in England or Ireland under seal, or under hand only, or made in Scotland, with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

By 16 Vict. No. 24 (New South Wales Statutes), it is provided (ss. 1, 2) that the governor of the colony with the advice of his executive council may grant letters of registration for the exclusive enjoyment and advantage for a period of not less than seven nor more than fourteen years of all inventions or improvements in the arts or manufactures to the author or authors, designer or designers thereof, or to his or their agents or assignees, and that such letters of registration shall within three days after the granting thereof be registered in the proper office in the Supreme Court, otherwise they shall be void and of no effect.

By 51 Vict. No. 3 (New South Wales Statutes), ss. 2 and 5, the governor of the colony is authorized to grant letters patent. By s. 10, every grantee of letters patent, whether granted under that or the previous Act, may assign them by instrument in writing under his hand and seal. By s. 11, every grantee of letters patent may by an instrument in manner aforesaid grant a licence to exercise proprietary or co-proprietary rights over the whole or any portion of the invention protected by the letters patent. By s. 12, every assignment made under the authority of s. 10, and every licence issued under the authority of s. 11, shall be null and void if not registered in the prescribed time and manner. By s. 13, all letters patent and assignments thereof, or licences thereunder, shall be registered in the office of the Examiner of Patents. By s. 17, the term "letters patent" includes the letters of registration mentioned in 16 Vict. No. 24.

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property. Here there has been a conveyance executed in New South Wales upon which ad valorem duty has been paid.

The property in question is within the exception of "property locally situate out of the United Kingdom." Those words cannot be construed as confined to real property by reference to the previous words, "lands, tenements, hereditaments, or heritages." The ejusdem generis doctrine is not applicable. That doctrine applies only where general words are found in an enactment at the end of a clause enumerating a number of specific matters all of a similar kind. The exception in this sub-section of "property locally situate," &c., is a separate and independent exception in the midst of others, some of which relate to real and others to personal property. To make the ejusdem generis doctrine applicable, the words "locally situate out of the United Kingdom" ought to apply to all that goes before, whereas it is not suggested that the section applies to lands, &c., situated in the United Kingdom. In the cases where personal property has been said to have no locality what is intended is the right of property which is no doubt ambulatory, not the property itself.

The property in question here may be said to be locally situate out of the United Kingdom. It consists of a share in a patent and a licence to use it which are to be exercised only in New South Wales; and by the New South Wales statutes (16 Vict. No. 24 and 51 Vict. No. 3) the patent and any assignment of or dealing with it must be registered in New South Wales. For the purposes of probate all property is considered as locally situate somewhere. This case is analogous to *Attorney-General* v. *Dimond* (1), in which it was held that for probate purposes French rentes, which could only be transferred in France, must be treated as situate in that country. *Attorney-General* v. *Bouwens* (2) turned on the fact that the bonds there in question were marketable securities in this country, passing from hand to hand by delivery. The payment of the stamp duty is enforced by the exclusion from admissibility in evidence of an unstamped document under s. 14, sub-s. 4, of the Act. Unless an English patent is to be regarded as property situate

(1) (1831) 1 C. & J. 356. (2) (1838) 4 M. & W. 171.

in the United Kingdom, an agreement for sale of it cannot be brought within that sub-section.

[They also cited *Sill* v. *Worswick*. (1)]

The Solicitor-General (*Sir R. B. Finlay, Q.C.*) and *Danckwerts*, for the respondents. The property in question is "property" within the meaning of the sub-section, and the words in the exception, "property locally situate out of the United Kingdom," are not applicable to personal property. They must be read in conjunction with the words preceding, which are indicative of real or immoveable property as contrasted with chattels or moveable property. "Locally situate" has reference to something which has a permanent local situation, and therefore has the attribute of locality. In ordinary parlance no one speaks of chattels as locally situated, though of course they must at any given moment be somewhere. The construction contended for by the appellants makes "property" in the exception clause include personal property as well as real property, whereas "goods" and other matters which are personal property are specifically dealt with subsequently in the clause.

But even if the ejusdem generis doctrine does not apply, personal property has no locality: see per Abbott C.J. in *Doe* d. *Birtwhistle* v. *Vardill* (2); or, if the words "property locally situate out of the United Kingdom" may apply to chattels which are by nature capable of having a local situation, though not a permanent one, the property here in question is not of that nature. It consists of incorporeal rights which like debts and contracts cannot really have any local situation. The analogy of probate cases, such as *Commissioner of Stamps* v. *Hope* (3), is not applicable for the present purpose. If it were, it would follow that in the case of an agreement for the sale of a debt or other chose in action, it would be necessary to ascertain where the debtor or other contractor was in order to see whether the property was or was not situate out of the United Kingdom. This cannot have been the intention.

A. T. Lawrence, in reply.

(1) (1791) 1 H. Bl. 665. (2) (1826) 5 B. & C. 438.
(3) [1891] A. C. 476.

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LORD ESHER M.R. I am of opinion that this appeal should be dismissed. I agree with Pollock B. in thinking that the expression "locally situate" cannot apply to something which in truth and in fact has no locality. I am, speaking for myself, disposed to think that the ejusdem generis doctrine, which governs the construction of general words immediately following particular words, is applicable to the construction of this exception, and that the words "or property locally situate out of the United Kingdom," following, as they do, the words "lands, tenements, hereditaments, or heritages," all of which denote real property, must be construed as meaning property of the same kind. But, as Rigby L.J. is of the opposite opinion, and I do not feel clear on the point, I shall not base my judgment on that doctrine. Looking, therefore, at the words "property locally situate out of the United Kingdom" by themselves, apart from that doctrine, the question is whether they include the subject-matter of this agreement. That such a subject-matter is "property" within the earlier part of the section it is impossible to doubt. The question is whether it comes within the words "property locally situate out of the United Kingdom" in the exception. It may be that there are chattels of which it may fairly and truly be predicated that they are "locally situate out of the United Kingdom." It is not necessary to decide that to be so. I will assume it. If a chattel is a physical, tangible thing, which can be touched and seen, and which can be placed in a particular place, it may be "locally situate" within the meaning of those words in the Act. But the property here in question cannot be touched, or seen, or placed anywhere. It is incapable of being brought within the fair and true meaning of the words "locally situate" or of being said to exist in any locality. It therefore does not seem to me to come within the exception, and it is within the general word "property"; and consequently the appellants are liable to pay the duty with which they have been charged. Many nice questions have been raised in the course of the argument which some day may have to be decided, but I decline to go into them, as not being necessary for the purposes of this case. I decide the case upon the construction of the

words of s. 59 of the Act read according to their ordinary meaning. Applying those words to the subject-matter of this agreement I am of opinion that it is not within the exception contained in the section.

LOPES L.J. Two questions arise in this case upon s. 59, sub-s. 1, of the Stamp Act, 1891. The first is whether the particular things with which the agreement in question deals are within the word "property" in the earlier part of the sub-section. The particular things dealt with are a share in a patent granted in New South Wales, and a sole licence to use the invention patented in a specified district of New South Wales. I am clearly of opinion that these things are "property" within the sub-section. The second question is whether they come within the words of the exception as being "property locally situate out of the United Kingdom." It was argued for the appellants that these words are used in a general way and include personal property. Speaking for myself, I think they do not, though I express that opinion with diffidence, because my brother Rigby does not, I believe, agree with me on that point. I think the proper way of construing those words is to apply to them what is known as the ejusdem generis doctrine, or, as it is sometimes expressed, the doctrine "noscitur a sociis," which is that, where general words immediately follow or are closely associated with specific words, their meaning must be limited by reference to the preceding words. In this sub-section the words in question, "property locally situate out of the United Kingdom," follow words which all of them indicate real property, and I think they must be construed as referring to property of the same kind as is indicated by the preceding words, namely, immoveable property, and not to moveable property such as chattels. That view would be sufficient to determine this case, but, if it be not correct, I am nevertheless of opinion that, having regard to the nature of the property which is the subject-matter of the agreement in question, it cannot in any sense be said to be locally situate out of the United Kingdom. I do not see how a share in a patent, or a licence to use a patent, which is not a visible or tangible thing,

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can be said to be locally situate anywhere. On these grounds I think the appeal must be dismissed.

RIGBY L.J. I am of the same opinion in the result. I agree that this property is within the terms of the sub-section and not within the terms of the exception contained in it. I cannot myself accept the view that the words "property locally situate out of the United Kingdom" are to be confined to property of the same nature as "lands, tenements, hereditaments, or heritages." The rule of construction which is called the ejusdem generis doctrine, or sometimes the doctrine "noscitur a sociis," is one which, I think, ought to be applied with great caution; because it implies a departure from the natural meaning of words, in order to give them a meaning which may or may not have been the intention of the Legislature. In this sub-section I find five exceptions from the general operation of the clause. The first exception is that of "lands, tenements, hereditaments, or heritages." That applies to all such property whether in or out of the United Kingdom. The second exception, which appears to me to stand entirely on its own basis, is "property locally situate out of the United Kingdom." That seems to me to be an addition to the exception of "lands, &c.," wherever situate, of property outside the United Kingdom, without any indication that it is to be confined to real as distinguished from personal property. Then there is a third exception of "goods, wares, or merchandise," a fourth of "marketable securities," and a fifth "of any ship or vessel, or part interest, share, or property of or in any ship or vessel." On the principle "noscitur a sociis," why are we to say that the exception "property locally situate out of the United Kingdom" is associated with the preceding exception of "lands, &c.," rather than with the subsequent exception of "goods, wares, or merchandise"? I cannot see why upon the doctrine vouched we are to fix our attention on the preceding exception and disregard the subsequent exceptions.

Assuming my view on this point to be correct, then comes the question whether this particular kind of property—namely, an interest in a patent right—has a local situation out of the

United Kingdom. For many important purposes connected with this property it is no doubt necessary to look to New South Wales; for that is the country in which the monopoly created by this patent is to be exercised, and it appears that any transfer of the property must within a certain time be registered there. It is suggested that the effect of that is that the property must be treated as locally situated in New South Wales. The cases on the subject which are nearest to the present case are the cases with regard to probate. If this case were to be dealt with by analogy to those cases, and it were necessary to decide whether it was more nearly analogous to *Attorney-General* v. *Dimond* (1) or to *Attorney-General* v. *Bouwens* (2), I should be inclined to say it was more nearly analogous to the latter. It does not appear to me to have been shewn by the persons seeking exemption—and it is incumbent on them to shew it—that this is not a right of property capable of being dealt with in this country, as was the case with the property in *Attorney-General* v. *Bouwens*. (2) I agree that there is the distinction that in that case the bonds in question were transferable by delivery; but what was relied on was that they were matters of sale and purchase in this country, and therefore might well have a local situation here in the eye of the law. So far as the facts are before us, it does not appear to me to be made out that patent rights of this kind are not matters of sale and purchase in this country. It is true that a sale here, followed by an assignment here—for I do not see why there should not be an assignment here—might in some respects, at any rate the assignment might, become null and void, if not afterwards registered in New South Wales; but I am not satisfied that that creates such a distinction as to compel us to say that this property is locally situate in New South Wales, whereas the bonds in the case of *Attorney-General* v. *Bouwens* (2), which after all were merely obligations for the payment of a certain sum by a foreign government, and therefore according to the more general rule would be treated as locally situated in the country where the debtor was, were nevertheless taken out of that rule, because they were capable of being dealt with

(1) 1 C. & J. 356. (2) 4 M. & W. 171.

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as articles of sale and purchase in this country. In *Attorney-General* v. *Dimond* (1) it was held that, where property cannot be dealt with here—that is to say, cannot be assigned here, though of course a bargain might be entered into in respect of it here—it cannot be considered as locally situate in this country for the purposes of probate, but must be considered as locally situate in the foreign country where alone it can be dealt with. If it were necessary to decide which of the two decisions is applicable to the present case, I am not able to say that it comes within *Attorney-General* v. *Dimond* (1) rather than *Attorney-General* v. *Bouwens*. (2) But I do not know that it is necessary to do so. The term "locally situate" may have different meanings for different purposes. It has been used, and I think correctly used, with regard to chattels which have a tangible existence, which can be handled or seen, and which must have a local situation at any given moment of time, though they may sometimes be in one place and sometimes in another. These are not incapable of having a local situation, because they may have, one after another, many local situations. No doubt for certain purposes incorporeal rights and choses in action, such as debts, are treated by a legal fiction as being where the debtor is; but I do not know that we are therefore compelled to say, or ought properly to say, that they have a local situation there. The incorporeal right can only be made effectual where the debtor is from the nature of the right; you can only sue a man where you can find him, but it does not follow that the right really can have a local situation there or anywhere. I am not satisfied that patent rights have any local situation anywhere within the proper meaning of the words "locally situate" as used in this statute. It is on that ground mainly, or almost entirely—for I only dealt with the probate cases by way of illustration—that I agree with the decision of the Divisional Court to the effect that this case does not come within the exception contained in sub-s. 1 of s. 59. It was argued that it was a hardship that the appellants should have to pay duty twice over; but there are numerous cases in which persons carrying on a business partly in this country and partly

(1) 1 C. & J. 356.

(2) 4 M. & W. 171.

in another bring themselves within the revenue laws of both countries. We cannot interpret the statute with reference to any consideration of that kind. For these reasons I think that the judgment of the Divisional Court must be supported, and this appeal dismissed.

Appeal dismissed.

Solicitors for appellants: *Ince, Colt & Ince.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

E. L.

[IN THE COURT OF APPEAL.]

SLOANE *v.* BRITAIN STEAMSHIP COMPANY, LIMITED.

Practice—Discovery—Action in Formâ Pauperis—Case laid before Counsel—Inspection, Right to—Exhibit to Affidavit—Order XVI., *rr.* 23, 24.

A plaintiff suing in formâ pauperis cannot be ordered to produce for inspection by the defendant the case laid before counsel under Order XVI., r. 23, and his opinion thereon, even where they have been made exhibits to the affidavit filed in accordance with Order XVI., r. 24.

In re Hinchliffe, [1895] 1 Ch. 117, distinguished.

APPEAL of plaintiff from the order of a judge at chambers made as after mentioned.

The plaintiff was suing in formâ pauperis. The defendants applied to a master for an order for inspection of the case laid by the plaintiff before counsel under Order XVI., r. 23, and his opinion thereon, which had been made exhibits to the affidavit filed in accordance with Order XVI., r. 24, upon the application for leave to sue in formâ pauperis. The master referred the application for inspection to the judge, making a note on the summons to the effect that the practice appeared to be to allow the defendant in such cases to inspect the affidavit, and calling the judge's attention to *In re Hinchliffe*. (1) The judge made an order for the inspection applied for.

C. G. Ellis, for the plaintiff. The defendants are not entitled to the inspection claimed. It appears to be the practice to

(1) [1895] 1 Ch. 117.

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allow the defendant in such cases to inspect the affidavit upon which leave to sue in formâ pauperis has been obtained; but it is contended that the practice in that respect is wrong. It is not an affidavit made in the action, but merely an affidavit made for the information of the Court to prevent abuse of their process. In any case the defendant is not entitled to inspect the case submitted to counsel and his opinion thereon, even although they have been made exhibits to the affidavit: see *Bryant* v. *Wagner*. (1) *In re Hinchliffe* (2), upon which reliance will be placed for the defendants, was a wholly different case, and what was there said was never intended to apply to such a case as the present.

J. E. Bankes, for the defendants. The practice of allowing the defendant to inspect the affidavit upon which leave to sue in formâ pauperis has been obtained is clearly right, because the defendant may move to discharge the order giving that leave, if made on insufficient grounds: *Hawes* v. *Johnson*. (3) It is not contended that in all cases a defendant would be entitled to see the case laid before counsel and his opinion. It does not appear to be made essential by the rules that these documents should be made exhibits to the affidavit; and, where that had not been done, the defendant might not be entitled to inspection. But, where the plaintiff has chosen to make them exhibits to his affidavit, the defendant is entitled to inspection of them as being in effect part of the affidavit which he is entitled to see. In the case of *In re Hinchliffe* (2) it was held that, wherever there was a right to inspect an affidavit, there was a right to inspect documents made exhibits thereto.

LORD ESHER M.R. The true answer to the question raised is that the case was laid before counsel, and his opinion taken upon it for the information of the judge to whom application was made for leave to sue in formâ pauperis, and for his information only; and therefore it was not competent for the judge at chambers to make an order for inspection of those documents by other persons. I think this appeal must be allowed.

(1) (1839) 7 Dowl. 676. (2) [1895] 1 Ch. 117.
(3) (1826) 1 Y. & J. 10.

LOPES L.J. I agree. It appears to me immaterial whether the case and opinion are made exhibits to the affidavit or not. I proceed upon the general ground that they are merely for the information of the judge, and therefore the opposite party has no right to see them. It seems to me that this view is in accordance with the observations made by Coleridge J. in *Bryant* v. *Wagner* (1), to the effect that the certificate of counsel given for the purpose of obtaining leave to sue in formâ pauperis was not for the benefit of the opposite party but for the information of the Court. I feel clear that in what was said by the Court of Appeal in *In re Hinchliffe* (2) such a case as the present was not contemplated; and I believe that the judges who decided that case would, if this case had been in their minds, have drawn the same distinction as we are now doing.

RIGBY L.J. Where application is made for leave to sue in formâ pauperis, the rules provide that documents which litigants in other cases could not be compelled to produce, namely, the case laid before counsel and his opinion thereon, shall be produced, not in order that the opposite party may see them, but that the Court may see whether there is a fair primâ facie ground for the action. It was never intended that this provision should be turned into a means of obtaining for the opposite party a right of seeing what under other circumstances he would have no right to see. The fact that the case and opinion have been made exhibits to the affidavit does not in my opinion make any difference. I agree with my brother Lopes that the case of *In re Hinchliffe* (2) was one of a wholly different character, and nothing that was said in that case has any application to the present case.

Appeal allowed.

Solicitors for plaintiff: *Ewer & Neave, for Woodburn & Holme, Liverpool.*

Solicitors for defendants: *Botterell & Roche.*

(1) 7 Dowl. 676.

(2) [1895] 1 Ch. 117.

E. L.

1896
Dec. 16.

THE QUEEN *v.* SODEN AND OVEREND.

Parliament—Registration—Revising Barrister closing Lists—Right of Voter to be heard in answer to Objection—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-ss.* 9, 10.

By s. 28, sub-s. 9, of the Parliamentary and Municipal Registration Act, 1878, "Subject as herein and otherwise by law provided the revising barrister shall retain the name . . . . of every person objected to unless the objector appears . . . . in support of his objection." By sub-s. 10, "If the objector so appears the revising barrister shall require him, unless he is an overseer, to prove that he gave the notice of objection required by law to be given by him, and to give primâ facie proof of the ground of objection, ... and unless such proof is given to his satisfaction shall, subject as herein and otherwise by law provided, retain the name of the person objected to."

A notice of the revision of the lists of parliamentary and municipal electors for a borough stated that the lists for a certain parliamentary division of the borough would be closed at a certain sitting of the revision court. At the termination of that sitting the revising barrister, being satisfied that there were no claimants or persons objected to who desired to be heard, declared the lists closed. Upon the occupiers' list was the name of a certain voter who was objected to by an objector who was not an overseer, but at the time of the lists being declared closed no person had applied to be heard either in support of the voter's right to be on the list or in support of the objection thereto, although both the objector and the agent of the person objected to had been present throughout the sittings of the court. On the following day the revising barrister allowed the objector to prove service of notice of objection and to give primâ facie proof of the ground of objection; while he at the same time refused to hear evidence on behalf of the voter in opposition to the objection, on the ground that, the lists having been closed, his application to be heard was too late; and he expunged the voter's name from the list:—

Held, that, notwithstanding the provisions of the above-mentioned sections, the revising barrister was justified in so doing.

RULE to a revising barrister to state a case.

The annual revision of the lists of parliamentary and municipal electors for the central division of the borough of Leeds for the year 1896 was by a revision notice advertised to be held on the 12th, 14th, and 15th of September; and notice was thereby given that the lists would be closed at the end of the sitting on September 15. The name of Thomas Sykes had

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been placed on Division 1 of the occupiers' list prepared by the overseers of the city of Leeds, and the list containing his name was duly published on July 31, 1896. On August 20 Thomas Sykes received a notice of objection by Joshua Overend, who was not an overseer. On August 25 the overseers for the city of Leeds duly published a list of objections, including the objection to the retention of the name of Thomas Sykes. Thomas Sykes thereupon appointed one Linforth to appear at the revision court on his behalf; and the said Linforth attended at the Court on the 12th, 14th, 15th, and 16th of September, and was prepared to contest the objection to the name of Thomas Sykes and support his right to have his name retained on the list. At the end of the evening sitting of the court on September 15 the revising barrister, in accordance with his usual practice, asked if there were any more persons present, either claimants or persons objected to, who desired to be heard; and being satisfied that there were no more such persons who desired to be heard, he declared the lists closed. At that time neither Joshua Overend nor any person on his behalf had applied to be heard in support of the objection to the name of Thomas Sykes, nor had any application been made by Linforth to be heard in support of the retention of Sykes' name. On the following day the revising barrister proceeded to receive proof of service of notice of Overend's objection, and also primâ facie proof of the ground of his objection; but he refused to receive the evidence of Sykes in opposition to the objection, on the ground that the lists were already closed, and he expunged the name of Thomas Sykes from the list. An application was then made to the revising barrister to state a case, but the application was refused. A rule having been obtained calling on the revising barrister to shew cause why he should not state a case,

H. Sutton, for the revising barrister, shewed cause. The revising barrister was entitled to make the arrangements which he did for the conduct of the business in his court. In a populous town like Leeds the business could not be got through in the time at the barrister's disposal if claimants and persons objected to were allowed to come forward and

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support their claims at any times they chose during the sittings of the court. For some years past it has been the practice at Leeds to separate the contentious and non-contentious business, and to allot particular days for the transacting of the former, within which days persons objected to who intended to oppose the objections were required to notify their opposition and litigate the matter. This practice has been already approved by the Court of Appeal in *Reg.* v. *Soden*. (1) That case covers the present.

W. Graham, for Overend, the objector. The rule, if any, ought to be not to state a case, but to hear and determine the voter's right to be retained on the list.

Lewis Thomas, in support of the rule. The case of *Reg.* v. *Soden* (1) is not in point In that case the person who sought to be heard after the closing of the lists was a claimant, and as the onus of proof lay upon him to establish his claim, he ought to have claimed to be heard within the time limited for contentious business. Here the onus of proof did not lie upon Sykes, for he was not a claimant, but a person objected to, and the objector was not an overseer. Sect. 28, sub-ss. 9, 10, and 11 (2), expressly provides that, in the case of a person already

(1) [1896] 1 Q. B. 634.

(2) By the Parliamentary and Municipal Registration Act, 1878, s. 28, "A revising barrister shall with respect to the lists of voters for a parliamentary borough which he is appointed to revise perform the duties and have the powers following:"

"(9.) Subject as herein and otherwise by law provided, the revising barrister shall retain the name of every person not objected to, and also of every person objected to, unless the objector appears by himself or by some person on his behalf in support of his objection."

"(10.) If the objector so appears the revising barrister shall require him, unless he is an overseer, to prove that he gave the notice or notices of objection required by law to be given by him, and to give primâ facie proof of the ground of objection . . . . and unless such proof is given to his satisfaction shall, subject as herein and otherwise by law provided, retain the name of the person objected to;"

"An objection made under this Act by overseers shall be deemed to cast upon the person objected to the burden of proving his right to be on the list;

"The primâ facie proof shall be deemed to be given by the objector if it is shewn to the satisfaction of the revising barrister by evidence repute or otherwise that there is reasonable ground for believing that the objection is well founded, and that by reason of the person objected to not being present for examination, or for some other reason the objector is prevented from

on the list who is objected to, the onus of proof shall lie upon the objector, unless he is an overseer. In such a case it is for the objector to begin and give primâ facie proof of his objection, and unless he does so within the time within which the voter is entitled to be heard he is too late to prove his objection, for in such case sub-s. 10 says that the barrister shall retain the name of the person objected to. To hold that proof of the grounds of objection could be received after the lists were closed is to repeal the Act of Parliament. It would not be within the competence of a judge of the High Court to make a rule of practice requiring the defendant in all cases to begin, and a revising barrister cannot have any wider power.

WILLS J. I am of opinion that this rule must be discharged. What the revising barrister has done is simply to make a convenient rule of practice to enable him to carry on the business of his court, and what he has said is, "If people want to have their cases treated as contested cases they must let me know within the first three sittings." It was perfectly well known that this practice had been in existence for some years, and it had been acquiesced in by every one concerned except the particular person on whose behalf this rule is moved. He did not take proper steps to inform the revising barrister that the objection to Sykes' vote would be opposed. Under those circumstances the case went over to the next day as one in which the objection was not going to be fought. The revising barrister then proceeded to treat it as part of the non-contentious business, although no doubt it was judicial in the sense that he had to deal with the question of the service of notice of the objection. In my judgment the practice was a perfectly reasonable one, and unless loyal co-operation on the

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discovering or proving the truth respecting the entry objected to."

"(11.) If such proof is given by the objector as herein prescribed, or if the objection is by overseers, then unless the person objected to appears by himself or by some person on his behalf and proves that he was entitled on the last of July then next preceding to have his name inserted in the list in respect of the qualification described in such list, the revising barrister shall expunge the name of the person objected to."

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part of the practitioners can be secured, I do not see how the business can possibly be carried on.

WRIGHT J. I am of the same opinion, and only wish to add that I agree with Mr. Graham that if the applicant had any remedy at all, it was a rule not to state a case but to hear and determine. The power to grant a case only exists where a person is aggrieved or dissatisfied with any decision of any revising barrister on any point of law material to the result of such case. There is no point of law here.

Rule discharged.

Solicitor for prosecutor: *A. Scott Lawson.*
Solicitor for revising barrister: *Solicitor to the Treasury.*
Solicitors for objector: *Hickin & Co.*

J. F. C.

1896
Dec. 16.

HINDLE AND ANOTHER, APPELLANTS *v.* BIRTWISTLE, RESPONDENT.

Factory and Workshop Acts — Dangerous Machinery — Shuttle flying out of Loom — Obligation to Fence — Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), *s.* 5, *sub-s.* 3 — *Factory and Workshop Act*, 1891 (54 & 55 *Vict. c.* 75), *s.* 6, *sub-s.* 2.

By s. 5, sub-s. 3, of the Factory and Workshop Act, 1878, as amended by s. 6, sub-s. 2, of the Factory and Workshop Act, 1891, "all dangerous parts of the machinery" in a factory shall be securely fenced or otherwise rendered safe.

The occupier of a cotton factory was summoned under the above section for neglecting to fence the shuttles of his looms. It appeared that shuttles do occasionally in the process of weaving fly out from the bed upon which they slide to and fro (called the shuttle-race) under circumstances which render them dangerous to any persons who happen to be in the line of flight. The flying out of the shuttles may be caused by the negligence of the weaver in charge of the machine, or by reason of some foreign substance getting accidentally into the shuttle-race, or by defect in the yarn:—

Held, that the obligation to fence under the above section was not confined to machinery which was dangerous in itself in the ordinary course of careful working; and that the shuttles, even though not in themselves

defective, were "dangerous parts of the machinery" if any of the above-mentioned causes of their flying out of the shuttle-race were likely to occur with any degree of frequency.

CASE stated by the recorder of Blackburn.

On October 3, 1895, the appellants Ephraim Hindle and George Hindle were convicted by a court of summary jurisdiction at Blackburn under the Factory and Workshop Acts, 1878 and 1891 (1), for that they on August 7, 1895, being the occupiers of a cotton factory, did unlawfully fail to keep such factory in conformity with the said Acts by neglecting to fence a certain dangerous part of the machinery in the factory, to wit, the shuttles, such shuttles not being in such a position or of such construction as to be equally safe to every person employed in the factory as they would be if they were securely fenced.

The appellants appealed to the general quarter sessions of the borough of Blackburn.

Upon the hearing of the appeal the following facts were proved. The appellants on August 7, 1895, were and for several years continuously theretofore had been the occupiers of a certain weaving-shed in Blackburn in which there were the ordinary looms and shuttles used in weaving cotton cloth. It was admitted that the shed was a factory within the meaning of the Factory and Workshop Acts, 1878 and 1891. On August 7 a shuttle flew out of the shuttle-race of one of the looms in work in the said factory, and in its flight struck and seriously injured a weaver in the employment of the appellants. The accident was caused by the negligence of the said weaver in fastening the picking band (the part of the machinery which strikes the shuttle and drives it across the shuttle-race) too taut, whereby the shuttle was deflected from its proper course in the

(1) By the Factory and Workshop Act, 1878, s. 5, "With respect to the fencing of machinery in a factory the following provisions shall have effect:"

Sub-s. 3: "Every part of the mill gearing shall either be securely fenced or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced."

By the Factory and Workshop Act, 1891, s. 6, sub-s. 2, "In sub-section three (of section five of the principal Act) before the words 'every part' shall be inserted the words 'all dangerous parts of the machinery and.'"

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shuttle-race and so flew out. In addition to this accident on August 7, 1895, there were during the years 1891 to 1895 both inclusive three other serious accidents caused by shuttles flying from looms in the appellants' factory; but what caused such shuttles to fly out there was no evidence to shew. During the said period there were 1400 looms in work during most working days in the appellants' factory, and throughout that period the appellants' machinery was in substantially the same condition. It was proved that while the shuttle is running backwards and forwards in the shuttle-race—that is to say, while it is performing in due course the part it is intended to perform in weaving cotton—it is not dangerous. It was, however, also proved that shuttles do occasionally fly out from the shuttle-race during the process of weaving under circumstances which render such flying shuttles dangerous to any persons who may chance to be in the line of their flight. The flying out of such shuttles is due to one or other of the following causes: (*a*) the shuttle not being true; (*b*) the negligence of the weaver in charge of the machine; (*c*) some foreign substance accidentally getting into the shuttle-race; (*d*) some defect in the yarn or thread used in the loom. There was no evidence to shew that the appellants' looms or any of them during the period before-mentioned were fitted with shuttles that were not true. There was no evidence that the appellants omitted any reasonable precaution to prevent foreign substances getting into the shuttle-race or to detect any defect in the yarn or thread. The recorder was of opinion that the owner of a factory is responsible only for machinery which is in itself dangerous in the ordinary course of careful working, and he accordingly quashed the conviction subject to a case for the opinion of the Court.

Sir R. Webster, *A.-G.*, *H. Sutton*, and *Sanderson*, for the respondents. The recorder was wrong in holding that a machine which is dangerous only by reason of negligence in the workman or something external to itself cannot be a dangerous machine within the meaning of the Act. Every machine is dangerous and liable to be fenced if by careless working or external causes it is liable to produce injury. The cause of accidents lettered

(*b*), (*c*), and (*d*) in the case are certain to recur at intervals, and the fact that those intervals are likely to be long does not make the danger any the less one which it is proper to provide against by fencing.

Sir E. Clarke, Q.C., and *E. Sutton*, for the appellants. It may be that if a machine requires such delicate handling and constant attention that an omission to use the necessary care is likely to happen frequently it ought to be fenced; but that is not the case here, for there have been only four accidents in five years in a shed of 1400 looms. So that the chances of an accident happening from external causes in the case of any particular loom are so small that it would be unreasonable to be required to provide against it. It is a question of degree.

Sir R. Webster, *A.-G.*, in reply.

WILLS J. This case is one of considerable importance, but the enactment seems to be plain and intelligible, and I feel no difficulty in construing it. The learned recorder has supplied us with the keynote of his judgment in one sentence, in which he says that "the manufacturer is only responsible for machinery which is in itself dangerous in the ordinary course of careful working." He seems to think that no machinery can be said to be dangerous unless it is dangerous in itself, however carefully worked. I entirely disagree with such an interpretation, and think that it would limit most materially a very beneficial Act of Parliament. It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is

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entirely a question of degree. As the recorder has not dealt with the matter from that point of view, the case must go back to him for reconsideration.

WRIGHT J. I am of the same opinion. The justices of the borough of Blackburn, who are presumably persons acquainted with these matters, came to the conclusion that these shuttles were dangerous. The recorder has reversed their decision on a view of the law which is in my judgment erroneous. It seems to me that the chances that the workmen will be negligent, that foreign material will get in, or that the yarn may be of bad quality, must all be taken into consideration. The mere fact that the shuttle will sometimes fly out, and that when it flies out it is dangerous, is not enough. It is a question of degree and of fact in all cases whether the tendency to fly out is a tendency to fly out often enough to satisfy a reasonable interpretation of the word "dangerous."

Case remitted to the sessions.

Solicitors for respondents: *Solicitor to the Treasury.*

Solicitors for appellants: *Rowcliffes & Rawle, for Carter, Blackburn.*

J. F. C.

OSBORN *v.* WOOD BROTHERS.

1896
Dec. 10.

Justices—Jurisdiction—Mitigation of Statutory Fine—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 4—*Cotton Cloth Factories Act*, 1889 (52 & 53 *Vict. c.* 62), *s.* 13.

The power given to courts of summary jurisdiction by s. 4 of the Summary Jurisdiction Act, 1879, to reduce the prescribed amount of a fine, if it be imposed as in respect of a first offence, does not enable them to reduce the prescribed amount of the fine imposed by s. 13 of the Cotton Cloth Factories Act, 1889, which enacts that where there is a contravention of or non-compliance with the provisions of the Act, and after written notice from the inspector the acts are continued or not remedied, the occupier of the factory is to be liable, on summary conviction, for the first offence to a penalty of not less than 5*l.* nor more than 10*l.*

CASE stated by justices of Lancashire.

The respondent had appeared to answer an information under the Cotton Cloth Factories Act, 1889, which charged that he, "being the occupier of a factory, allowed the amount of moisture in the atmosphere of the factory to be in excess of such amount as was represented by the number of grains of moisture per cubic foot of air shewn in column 1 of the table in Schedule A to the Act opposite to such figure in column 2 as represented the temperature existing in such cotton cloth factory at such time, that being a contravention of the Act repeated within twelve months after notice in writing to the occupier of the factory of a similar contravention of the provisions of the said Act."

By s. 5, sub-s. 1, of the Cotton Cloth Factories Act, 1889, provision is made that the amount of moisture in the temperature of the air in a factory is not to exceed the prescribed amount. By s. 13, "If in the case of any cotton cloth factory there is a contravention of or non-compliance with any of the provisions of this Act, the inspector shall give notice in writing to the occupier of the same of the acts or omissions constituting the contravention or non-compliance, and if such acts or omissions, or any of them, are continued or not remedied, or are repeated within twelve months after such notice has been

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given, the occupier of such factory shall be liable, on summary conviction, for the first offence to a penalty of not less than five pounds nor more than ten pounds, and for every subsequent offence to a penalty of not less than ten pounds nor more than twenty pounds."

By s. 4 of the Summary Jurisdiction Act, 1879, "Subject as in this Act mentioned, and notwithstanding any enactment to the contrary, where a court of summary jurisdiction has authority under this Act, or under any other Act, whether past or future, to impose imprisonment or to impose a fine for an offence punishable on summary conviction, that court may, in the case of imprisonment, impose the same without hard labour, and reduce the prescribed period thereof, or do either of such acts; and in the case of a fine, if it be imposed as in respect of a first offence, may reduce the prescribed amount thereof."

The justices convicted the respondent, but were of opinion that, it being a first offence, they had a discretionary power to reduce the amount of the fine, and inflicted a penalty of twenty shillings.

The question for the opinion of the Court was whether s. 4 of the Summary Jurisdiction Act, 1879, gave the justices power to reduce the fine for a first offence imposed by s. 13 of the Cotton Cloth Factories Act, 1889.

Henry Sutton, for the appellant. The justices were wrong. In an ordinary case s. 4 of the Act of 1879 would no doubt give jurisdiction to reduce the fine in the case of a first offence; but from the language of s. 13 of the Act of 1889 it is clear that the Legislature deliberately intended that a penalty of not less than 5*l.* should attach to a first offence under that Act.

Danckwerts, for the respondents. Looking at the expression "notwithstanding any enactment to the contrary" in s. 4 of the Summary Jurisdiction Act, 1879, the application of that section can only be prevented by the clearest expression of the intention of the Legislature that it is not to apply. The power given by that section is only required where there is something in the statute under which the proceedings are taken which

prevents the justices from reducing the penalty, and the present is one of the very cases to which the section applies. There is no necessary inconsistency, for s. 13 of the Act of 1889 only says that the offender "shall be liable to" a penalty of not less than 5*l.*, which is consistent with a power in the court to reduce the fine. If the appellant is right, the effect is to repeal pro tanto, for the purposes of this Act, the provisions of s. 4 of the Act of 1879, and there can be no implied repeal if the two Acts can possibly be read together. [He cited *Kutner* v. *Phillips* (1); *Dobbs* v. *Grand Junction Waterworks Co.* (2); *Reg.* v. *Oastler.* (3)]

H. Sutton, in reply. It is not necessary to say that there has been any implied repeal of s. 4 of the Act of 1879—only that the Legislature has deliberately taken the particular offences in this special Act out of the scope of that section.

WILLS J. I am of opinion that this appeal must succeed. The question seems perfectly plain. It is true that s. 13 of the Act of 1889 uses the expression "on summary conviction," and therefore by virtue of s. 51 of the Summary Jurisdiction Act, 1879, that Act applies to the Cotton Cloth Factories Act, 1889, unless it can be seen that the two are plainly inconsistent, and that the Legislature has plainly expressed its intention that the provisions of the later should supersede those of the earlier Act. In my judgment the meaning of the Legislature is quite plain: it was intended to treat offences under s. 13 as serious offences, and to allow courts of summary jurisdiction no power to inflict a mitigated penalty for a first offence. An offence under s. 13 of the Act does not belong to the class of common offences; in order to constitute such an offence there must be a breach of some provision of the Act, a notice in writing by the inspector, and a subsequent repetition of the act, or a subsequent failure to remedy the omissions complained of. That is, in my judgment, a serious offence—one which shews something very like an intentional violation of the Act, or a determination not to carry out its provisions. I have no doubt

(1) (1891) 2 Q. B. 267, at p. 272. (2) (1882) 9 Q. B. D. 151, at p. 158.
(3) (1880) 50 L. J. (M.C.) 4, at p. 6.

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that Parliament intended to treat this particular type of offence as serious, and to exclude it from the operation of s. 4 of the Summary Jurisdiction Act, 1879. I think that no question of repeal arises; the only question which does arise, and which we decide, is whether in this instance the language used and the nature of the offence created indicate the intention of Parliament to override the provisions of s. 4 of the earlier Act.

WRIGHT J. I am of the same opinion. I think we should be assuming legislative powers if we held otherwise. It might be a sufficient explanation of the sections to say that, if the later Act is to be read into the earlier, the Legislature has deliberately engrafted upon the earlier Act the provisions of s. 13 of the later, and that we are not at liberty to get rid of those provisions. It may also be an explanation of s. 4 of the Act of 1879, that the Legislature intended that in all cases where existing statutes were being dealt with there should be power to mitigate the penalty, but that in the case of future Acts of Parliament the power should only exist where Parliament did not plainly prohibit or exclude such mitigation.

Appeal allowed.

Solicitor for appellant: *Solicitor to the Treasury.*

Solicitors for respondents: *Rowcliffes, Rawle & Co., for John Hall, Bury, Lancashire.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1896
Dec. 17.

KIRKHAM *v.* ATTENBOROUGH.
KIRKHAM *v.* GILL.

Sale of Goods—Contract—Sale or Return—Transfer of Property as between Seller and Buyer—Pledge of Goods—"Act adopting the Transaction"—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 18, *r.* 4 (*a*).

Where a person who has received goods on sale or return pledges them he thereby does an act adopting the transaction within the meaning of the Sale of Goods Act, 1893, s. 18, r. 4 (*a*), so that the property in the goods passes to him, and the original vendor cannot recover them from the person with whom they have been pledged.

APPEALS in two actions tried by a judge without a jury.

In the first case the plaintiff, a manufacturing jeweller, brought an action against a pawnbroker to recover property pledged by a man of the name of Winter. The plaintiff had delivered to Winter a large quantity of jewellery on sale or return, some of which was pledged with the defendant. The plaintiff claimed the return of the goods or their value. The second case was a similar one, and the two appeals were argued together. The learned judge had given judgment for the plaintiff in each case.

The defendants appealed.

Bonsey (*C. L. Attenborough* with him), for the defendant in the first case. By the Sale of Goods Act, 1893, s. 18, r. 4 (*a*): "When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein passes to the buyer: (*a*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction." A person who receives goods on sale or return receives them with an option of becoming owner: *Moss* v. *Sweet* (1); *Ex parte Wingfield*. (2) And the evidence that Winter adopted the transaction is that he put it out of his power to return the goods. The property in the goods thereupon passed

(1) (1851) 16 Q. B. 493. (2) (1879) 10 Ch. D. 591.

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KIRKHAM v. ATTENBOROUGH. KIRKHAM v. GILL.

to him, and the only remedy of the plaintiff is by action against him for the price. This was the view taken in *Brown* v. *Marr*. (1) Apart from the question of contract, the plaintiff must fail for the reason given by Lord Halsbury in *Henderson & Co.* v. *Williams* (2), that he has allowed the person to whom he entrusted the goods to hold himself out as the owner so that he is estopped from saying that Winter had no right to deal with them.

Bucknill, Q.C. (*C. L. Attenborough* with him), for the defendant in the second case, contended further, that it was immaterial whether the act of Winter, which amounted to an adoption of the transaction, was in fraud of the vendor of the goods or not.

McCall, Q.C., and *W. E. Hume-Williams*, for the plaintiff in each case. By s. 17 of the Act, "(1.) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case." Sect. 18 is merely a guide to arriving at the intention of the parties. The contract between them did not contemplate the pawning of the goods, nor a sale on credit to Winter, but a sale by him which would put him in funds to pay the plaintiff, or a sale to him on his payment of the price. If the pawning was dishonest, no inference can be drawn from it that Winter thereby adopted the transaction so that the property passed to him. If it was honest, it was made with the intention of redeeming the goods and retaking possession, in which case the relation between the plaintiff and Winter would be the same as before. This shews that in such a case the relation would not be disturbed by the pawning. The sub-s. (*a*) contemplates privity between the seller and the buyer, and not an act detrimental to the former. To make the sub-section apply, the act done by the holder of the goods must be one of which the vendor has notice, or of which he

(1) (1880) 17 Scottish Law Reporter, 277; Court Sess. Cas. 4th Series, vol. vii. 427.

(2) [1895] 1 Q. B. 521, at p. 527.

must be taken to have notice because it is an act contemplated by the contract.

There was no reply.

LORD ESHER M.R. There was in this case a contract between the plaintiff and Winter by the terms of which goods were delivered to the latter for sale or return. This contract is so common in business that it is well known to the Courts, and has been interpreted, and all Courts will now adopt the interpretation which has been put upon it. In the absence of other terms the contract does not pass the property in the goods directly it is made. The person who has received them may return them, but the person who has entrusted them to another cannot demand their return, and his only remedy is to sue for their price or value. We have, then, to see what is the position of the person who has received the goods. To determine this it is necessary to consider the principles adopted by the Courts, and now unhappily, as I think, codified in the Act, the language of which is unfortunately chosen. By the Act the property is to pass to the buyer when "he signifies his approval or acceptance to the seller or does any other act adopting the transaction." The transaction mentioned cannot mean the delivery of the goods on sale or return, because that had been done already, and it must mean that part of the transaction which makes the buyer the purchaser of the goods—in other words, the transaction adopted is that the goods have been sold to and bought by the person who received them originally on sale or return. There must be some act which shews that he adopts the transaction; but any act which is consistent only with his being the purchaser is sufficient. The act done by Winter, who was a possible purchaser under this contract, was that he pawned the goods. He could not get them back from the pawnbroker without repaying the sum advanced, and such a situation is inconsistent with his free power to return them. He ought not to have done this unless he meant to treat himself as purchaser, and by doing it he made himself purchaser; and the only right of the person who has entrusted him with the goods is to sue for the price of them. The decision of the

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learned judge cannot be supported, and the appeal must be allowed.

KIRKHAM v. ATTENBOROUGH. KIRKHAM v. GILL.

LOPES L.J. The position of a person who has received goods on sale or return is that he has the option of becoming the purchaser of them, and may become so in three different ways. He may pay the price, or he may retain the goods beyond a reasonable time for their return, or he may do an act inconsistent with his being other than a purchaser. The words of the Act are difficult to construe; but it seems to me that if the recipient of the goods retains them for an unreasonable time he does something inconsistent with the exercise of his option to return them, and thereby adopts the transaction. So if he does any other act inconsistent with their return, as if he sells them or pledges them, because if he pledges them he no longer has the free control over them so as to be in a position to return them. In all these cases he brings himself within the words of the section by adopting the transaction, and the property in the goods passes to him. If that is the state of the law, applying it to this case, it is clear that the plaintiff is not entitled to recover from the defendant either the goods or their price, and the judgment in favour of the plaintiff cannot be supported.

RIGBY L.J. I am of the same opinion.

Appeal allowed.

Solicitors for plaintiffs: *Collier & Collier.*

Solicitors for defendants: *Stanley, Attenborough & Tyler; John Attenborough.*

A. M.

UNIVERSO INSURANCE COMPANY OF MILAN *v.* MERCHANTS MARINE INSURANCE COMPANY.

1896
Nov. 13.

Insurance, Marine—Policy—Liability of Broker for Premiums.

The general rule of law, founded on mercantile custom, whereby the broker, and not the assured, is liable to the underwriters for the premiums on a policy of marine insurance, is not limited to the ordinary form of Lloyd's policy, but extends also to policies containing a promise on the part of the assured to pay the premiums.

ACTION tried before Collins J. in the Commercial Court.

The writ was indorsed with a claim for 1361*l.* 17*s.* 6*d.* for premiums of insurance upon policies effected by the defendants with the plaintiffs, and the defence, as indicated in a letter from the defendants' solicitors, was that the premiums were payable, not to the plaintiffs, but to the trustees of a deed executed for the benefit of their creditors by the brokers who had effected the insurances, against whom the defendants had an admitted set-off and counter-claim for 633*l.* 18*s.* 1*d.* The facts were shortly as follows:—

The policies in question were policies of reinsurance effected during November, 1895, by the defendants with the plaintiffs through Messrs. Tweedie, a firm of insurance brokers. A draft agreement between the plaintiffs and defendants as to reinsurances had been prepared, but was never executed; but the business between them was in fact transacted upon the terms of this intended agreement, by which the plaintiffs were to take by way of reinsurance and the defendants were to cede to them one-half of the aggregate of all lines underwritten by the defendants in London upon hull $\frac{\text{and}}{\text{or}}$ machinery $\frac{\text{and}}{\text{or}}$ materials of any steamer or steamers for any time risk in 1895, the amounts to be taken by the plaintiffs not to exceed 500*l.*, and the defendants to retain at least as large an amount. The premium paid to the plaintiffs was in every case to be at the same net rate as that received by the defendants less 7½ per cent., and the premiums less 7½ per cent. retained by the defendants as commission were to be paid monthly by the defendants to Tweedie

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Brothers, and by them to the plaintiffs' representative in London. Tweedie Brothers had a commission of 2½ per cent. The course of procedure was as follows. The plaintiffs handed to the defendants a quantity of their slips in blank. When a risk had been accepted by the defendants they filled up the slip with the particulars, filling in the blank under the heading "Policy in name of" with the word "Merchants"; the slip was forwarded to Tweedie Brothers, who in some cases stamped their own name in the blank under the heading "On account of"; in other cases the blank was not filled in. Tweedie Brothers then forwarded the slip to Sedgwick, the plaintiffs' London agent, in whose office the amount of premium was filled in and a debit-note prepared; the debit-note was sent to Tweedie Brothers, who in turn prepared a debit-note which was sent by them to the defendants. The plaintiffs then prepared a policy, which commenced with a recital of the proposal of the insurance to the plaintiffs, the proposers being in most cases stated to be the defendants, while in some cases the names of Tweedie Brothers were inserted; the policy then proceeded to witness that, in consideration of the person or persons effecting the policy promising to pay the premiums, the plaintiffs promised and agreed with the insured to perform and fulfil the contract. The policy was sent to Tweedie Brothers, who handed it on to the defendants.

On November 21, 1895, Tweedie Brothers suspended payment, and subsequently on December 13 they executed an assignment to a trustee for the benefit of their creditors; on November 26 the London agent of the plaintiffs wrote a letter to Tweedie Brothers cancelling their authority to collect any premiums due to the plaintiffs. The premiums on the policies effected by the defendants through Tweedie Brothers were not payable until December 8, and when the amount was demanded by the plaintiffs of the defendants, the latter replied that they were liable to the trustee of the brokers, against whom they claimed a right of set-off in respect of premiums on ordinary insurances effected with the defendants through Tweedie Brothers.

Evidence was called at the trial on behalf of the defendants

to prove a general custom among underwriters that the broker, and not the assured, was liable to the insurers for the premiums, and that such custom applied to insurances under policies in the form used by the plaintiffs.

Carver (*Channell, Q.C.*, with him), for the plaintiffs. The custom, which admittedly exists in the case of Lloyd's policies, to treat the broker, and not the assured, as liable for the payment of the premiums, has no application to a case like the present, for it is absolutely inconsistent with the policy itself, which contains a promise by the persons effecting the insurance to pay the premiums to the insurers; the defendants are the persons effecting the insurance in the present case, and are liable to pay the premiums direct to the plaintiffs. The basis of the custom to look to the broker for the premiums is the admission on the face of an ordinary Lloyd's policy that the premiums have been paid; there is no such admission in the present case, and the custom is excluded. Secondly, the custom only applies to ordinary transactions of insurance, and this is a special transaction. It is not an ordinary transaction of marine insurance effected through a broker, but is in substance a contract between the plaintiffs and the defendants that the defendants shall take risks on behalf of the plaintiffs; there is no need for the intervention of a broker in such a transaction, and the custom does not apply to a contract of insurance made directly between the principals. [He cited *Power* v. *Butcher*. (1)]

Joseph Walton, Q.C. (*J. A. Hamilton* with him), for the defendants. The arrangement in the present case does not differ in its essence from any other contract of reinsurance, and it is impossible to contend successfully upon the facts that Tweedie Brothers were not acting as brokers in the business.

Apart from any question arising on the special form of policy, the case comes within the general rule, as laid down in Arnould on Marine Insurance, at p. 194 (6th ed.), that the broker, and not the assured, is the debtor of the insurers for the premiums.

(1) (1829) 10 B. & C. 329.

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That theory, indeed, involves the liability of the assured, for the ordinary form of Lloyd's policy assumes that the premiums for which the assured is liable have been paid. In the present case the difficulty arises from the special form of policy; but, when it is carefully considered, it will be seen that the custom does not contradict the express contract any more than it contradicts a Lloyd's policy. The custom is founded on the assumption that the assured is liable to pay the premiums, and that the broker has paid them and has borrowed the money to pay them from the underwriters, as explained by Parke B. (1) in *Power* v. *Butcher*. (2) There is nothing to prevent the application of such a custom to a policy in the present form. [He also cited *Xenos* v. *Wickham*. (3)]

COLLINS J. This is an action by underwriters to recover premiums alleged to be due upon reinsurances entered into by the plaintiffs for the defendants. It is not disputed on behalf of the plaintiffs that there is a general custom in the case of Lloyd's policies whereby the broker is looked to by the insurer for the premiums, but it is contended that for two reasons that custom is inapplicable to the present case. First, it is said that there was here a special arrangement between the parties, the effect of which is to take the case out of the custom, if the latter were otherwise capable of applying. But was there anything in that arrangement to oust the ordinary rule in marine insurance policies as to the personal liability of the broker? When the draft agreement is looked at, there is nothing at all in it which would have that effect. It is true that the persons effecting the insurances had already themselves become underwriters, and that there was a general understanding (not amounting to a distinct agreement) that the plaintiffs should become underwriters to the extent of half the risk taken by the defendants; but the transaction remained in substance the same as an ordinary insurance contract, the plaintiffs being the underwriters, Messrs. Tweedie the brokers, and the defendants the customers. I can see nothing to take

(1) He was then Parke J.
(2) 10 B. & C. 329, at p. 347.
(3) (1863) 14 C. B. (N.S.) 435; 33 L. J. (C.P.) 13.

the transaction out of the category of an ordinary underwriting contract.

The second point is one of more interest and difficulty; it is this: that the custom cannot apply to this form of policy. It is contended upon the special terms of this policy, which is in the ordinary company form, that the form of the policy ousts the custom which commonly prevails, and which it is admitted settles at law the rights of the parties in the case of an ordinary Lloyd's policy as to the liability for the premiums. An ordinary Lloyd's policy contains a recital that the premium has been paid, and no recital of a contract to pay it; the present policy contains an express contract by the assured to pay the premium, and this express contract under seal is said to be inconsistent with a custom that the liability falls on the broker only. At first sight this seems a formidable objection; but I think it is successfully met by a consideration of the origin of the custom. Why should the custom apply to a Lloyd's policy and not to the present one? A Lloyd's policy contains a recital that the premium has been paid; but supposing that the recital were made in a policy not under seal, so as not to amount to an estoppel, then upon the contract of insurance there would be an obligation upon the person insured to pay the premium. But that obligation is treated as discharged, although it is not discharged in fact; it is considered to be discharged by reason of a fiction based upon a custom which has received judicial sanction. It is a well-recognised practice in marine insurance for the broker to treat himself as responsible to the underwriter for the premium; by a fiction he is deemed to have paid the underwriter and to have borrowed from him the money with which he pays. If that is a correct explanation of the origin of the custom, it is as applicable to this form of policy as to a Lloyd's policy. No doubt there is here a contract to pay by the assured; but by custom the broker is treated as personally liable, the same fiction being applicable, namely, that the broker has paid the premium, and has so absolved the assured from his liability, having first borrowed the money from the underwriter to make the payment. I am therefore of opinion that a custom has been clearly proved

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which has been expounded by judicial authority, that it is applicable to the form of policy in the present case, and that there must therefore be judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

W. J. B.

1896
Nov. 3.

VESTRY OF ST. JOHN'S, HACKNEY *v.* HUTTON.

Metropolis—Public Health—Order of Sanitary Authority as to insufficient Water-closet Accommodation—Jurisdiction of Magistrate—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 37, *sub-ss.* 3, 5.

The decision of the sanitary authority acting under s. 37, sub-s. 3, of the Public Health (London) Act, 1891, that a house is not furnished with proper and sufficient water-closet accommodation, is final, subject only to an appeal under sub-s. 5 to the county council. Where, therefore, the owner or occupier of a house is summoned for non-compliance with a notice of the sanitary authority to provide such accommodation, a magistrate has no jurisdiction to reverse the decision of the sanitary authority and to hold that the accommodation is not required.

CASE stated by a metropolitan police magistrate.

The respondent, who was the owner of No. 109, Southgate Road, Hackney, had been summoned under the Public Health (London) Act, 1891, for having in or upon the premises insufficient water-closet accommodation, notwithstanding directions specified in a notice served on the owner by the sanitary authority to rectify the same. (1)

(1) By 54 & 55 Vict. c. 76 (The Public Health (London) Act, 1891), s. 37, sub-s. 3, "If at any time it appears to the sanitary authority that any house, whether built before or after the commencement of this Act, is without such ashpit or water-closets as aforesaid, the sanitary authority shall cause notice to be served on the owner or occupier of the house, requiring him forthwith, or within such reasonable time as is specified in the notice, to provide the same in accordance with the directions in the notice; and, if the notice is not complied with, the said owner or occupier shall be liable to a fine not exceeding five pounds, and a further fine not exceeding forty shillings for each day during which the offence continues; or the sanitary authority, if they think fit, in lieu of proceeding for a fine, may enter on the premises and execute such works as the case may require,

It appeared from the facts stated in the case that the respondent had been previously summoned on May 16, 1895, for not providing any water-closet accommodation on the premises, and that after hearing the evidence and visiting the premises the learned magistrate found as a fact that there was water-closet accommodation, and dismissed the summons. Upon the hearing of the present summons on August 2, 1895, the learned magistrate thought that the matter was not a question of public health, but really arose out of a dispute between the landlord and tenant, the latter alleging that the landlord had agreed to erect another water-closet, while the former alleged that there was only a conditional promise to do so, if the tenant was a satisfactory one, which he was not; it further appeared that the tenant had put the sanitary authority in motion. The medical officer of health gave it as his opinion that every house of the class should have an inside water-closet, and that he would not be satisfied unless the respondent's house had a water-closet inside in addition to the existing water-closet accommodation. It was admitted by the solicitor for the appellants that in these matters the sanitary authority was guided by the medical officer of health. The learned magistrate adjourned the summons for six months to give the tenant an opportunity of bringing an action against his landlord, the respondent, in the county court, and at the end of that time, no such action having been brought, he dismissed the summons.

The question for the opinion of the Court was whether, under the circumstances, the learned magistrate was bound by the decision of the sanitary authority that the house was not furnished with proper and sufficient water-closet accommodation. If the Court were of opinion that he was so bound, and that his exercise of discretion was not valid, the case was to be remitted.

Beven, for the appellants. The magistrate had no jurisdiction

and may recover the expenses incurred by them in so doing from the owner of the house."

By sub-s. 5, "Any person who thinks himself aggrieved by any notice or act of a sanitary authority under this section may appeal to the county council, whose decision shall be final."

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to reverse the decision of the sanitary authority, who, in default of an appeal to the county council, are the sole determining authority under the section. The magistrate's jurisdiction was limited to the imposition of a fine on proof of the offence.

[He was stopped by the Court.]

Carrington, for the respondent. The sanitary authority might under the section have done the work themselves and recovered the cost as a civil debt. This was the only course open to a sanitary authority acting under s. 36 of the Public Health Act, 1875, and in cases under that section it has undoubtedly been held that the duty of the magistrate is merely ministerial. But s. 37 of the Act of 1891 gives the local authority the option of treating the owner's default as a criminal offence, and if they take that course they cannot be judges in a case in which they are also the prosecutors. It is true that in *Hargreaves* v. *Taylor* (1) it was held that in a proceeding by a surveyor to recover penalties under the Public Health Act, 1848, the justices had no power to go into the question whether the work ordered was necessary; but that was merely a proceeding to recover penalties, and not a criminal proceeding. It was not intended by this statute that a man should be punished criminally where the magistrate was of opinion that the proceedings were vexatious.

GRANTHAM J. In my judgment the learned magistrate in this case was bound to convict; whether the Legislature was wise in leaving him no discretion may be doubtful. The statute, however, places the control of such matters in the hands of the sanitary authority, and the magistrate is bound to act on their view, unless an appeal against the order of the sanitary authority is brought to the county council. The Act provides that the sanitary authority is to determine such questions, and that the decision of the county council is to be final. That leaves another question undecided, which indeed we do not determine, as it is not before us—whether, assuming that the magistrate was bound to convict the respondent, he was also

(1) (1863) 3 B. & S. 613; 32 L. J. (M.C.) 111.

bound to inflict a fine. The section merely says that the party shall be "liable to a fine"; and it might perhaps be contended in a particular case that it was not one in which there ought to be a fine. The question asked us by the magistrate must, however, be answered by saying that he was bound to convict the respondent.

WRIGHT J. I agree entirely with the judgment of my learned brother, subject to one qualification. I do not think that the magistrate is bound at once to convict: he might adjourn the summons to give an opportunity of appealing to the county council. I think also that he has all the ordinary discretionary powers of a judge or magistrate as to the punishment to be inflicted. The jurisdiction of the magistrate extended, I think, to this: he had jurisdiction to determine whether the notice was served upon the respondent, whether the person summoned was the owner or occupier of the house, whether the time allowed in the notice for doing the work was reasonable, and whether the things required to be done had been done in accordance with the notice; he had in my opinion no other jurisdiction.

Judgment for the appellants.

Solicitor for appellants: *Tiddeman.*
Solicitors for respondent: *Stones, Morris & Stone.*

W. J. B.

1896
Nov. 7.

[CROWN CASE RESERVED.]

THE QUEEN *v.* KING.

Criminal Law—False Pretences—Evidence—Letter written by Defendant—Opinion of Witness as to Meaning.

Upon the trial of an indictment for obtaining goods by false pretences, a letter written by the defendant to the prosecutor respecting the goods was put into the hands of the prosecutor, who was asked what opinion he formed as to the position or occupation of the defendant upon the receipt of the letter:—

Held, that, although the question of the proper inference to be drawn from the letter was for the jury, the question was admissible to shew the inference in fact drawn from it by the prosecutor.

A defendant who has been convicted upon an indictment charging him with obtaining credit for goods by false pretences cannot be afterwards convicted upon a further indictment charging him with larceny of the same goods.

Case stated by the chairman of quarter sessions for the county of Huntingdon.

The defendant was tried upon an indictment containing forty counts, charging him with obtaining goods by false pretences, with attempting to obtain goods by false pretences, and with obtaining credit by false pretences. The substance of the charge in the first count was that the defendant unlawfully, knowingly, and designedly did falsely pretend to Robert William Shackleton and others, trading as the Dairy Supply Company, Limited, that he was then carrying on business as a farmer or dairyman, and that he then required two Bessemer steel milk churns for use in the said business, by means of which false pretences he obtained from them two Bessemer steel milk churns with intent to defraud, whereas he was not then carrying on business as a farmer or dairyman, and did not require the churns for use in the said business or in any business, &c. It is unnecessary for the purpose of this report to refer to any of the other counts.

In support of the charge upon the first and other counts, Robert William Shackleton was called as a witness, and was

asked by the counsel for the prosecution "what opinion he formed as to the position and occupation of the defendant on the receipt by him of a certain letter." The following is a copy of the letter, which was received by the witness in reply to a communication from him to the defendant: "Earith, Hunts, Sept. 5, '95. The two 6-gallon milk churns on order do not require name on them, as they are only required for home use. Yours truly, John King." Counsel for the defendant objected to the question on the ground that the meaning and construction of the letter was a question for the jury, and quoted as his authority the dictum in *Reg.* v. *Cooper* (1); the objection was overruled. The reply of the witness was, "I thought the defendant was either a farmer or dairyman." The jury found the defendant guilty of obtaining goods by false pretences, of attempting to obtain goods by false pretences, and of obtaining credit by false pretences or fraud; and he was sentenced to three years' penal servitude on the first, and also on the second charge, the sentences to run concurrently, and to twelve months' hard labour, also to run concurrently, on the third.

At the same sessions the defendant was also charged in a separate indictment with the larceny of certain goods which formed the subject of certain counts of the first indictment, on which he had been previously convicted for obtaining credit for such goods by fraud. He pleaded not guilty, and, not being represented by counsel on this indictment, took the objection on his own behalf that, having been already convicted of having obtained credit by false pretences for the goods mentioned in the indictment, he could not in law be guilty of stealing the goods. The Court overruled the objection, and the defendant was convicted, and sentenced to six months' hard labour to run consecutively with the previous sentence of twelve months, and concurrently with the sentence of penal servitude.

The questions of law for the opinion of the Court were—

(1.) Whether the question put to the witness Shackleton and his reply thereto were admissible in evidence.

(2.) Whether the prisoner, having regard to the objection

(1) (1877) 2 Q. B. D. 510.

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THE QUEEN v. KING.

raised, was properly convicted of the larceny charged in the second indictment.

No counsel appeared to argue the case.

HAWKINS J. The case as stated is lengthy, and I think it unfortunate that it has not been argued by counsel; the substance of it, however (for it contains much that is immaterial), may be shortly put. The defendant was tried for obtaining and attempting to obtain goods by false pretences upon an indictment containing no fewer than forty counts; and I pause here to express my decided opinion that it is a scandal that an accused person should be put to answer such an array of counts containing, as these do, several distinct charges. Though not illegal, it is hardly fair to put a man upon his trial on such an indictment, for it is almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given upon the others. In such a case it would not be unreasonable for the defendant to make an application that each count or each set of counts should be taken separately. For the purpose of the decision of this case I need only deal with the first three counts: the first charges the defendant with obtaining two milk cans by false pretences, and the second and third charge him with similar offences; the rest I need not refer to, except to say that some of them are hopelessly bad. The question for us upon this part of the case (I will deal with the other part later on) is whether certain evidence which is set out in the case was wrongly admitted.

Though upon first reading the case I had some misgivings on the point, upon consideration I think that the evidence was rightly admitted; its effect is, of course, a wholly different question. In order to establish an indictment for false pretences three things must be shewn in some way: first, that the false pretence was in fact made; secondly, that it came to the knowledge of the person upon whom the fraud was practised, and that he believed it to be true; and, thirdly, that the property said to have been obtained by false pretences was in fact obtained by reason of the false pretence. Upon the first of

these requirements no question arises; and we may proceed to consider the second essential of the offence, whether the prosecutor believed the pretence to be true. I see no other mode in such a case as the present in which his belief in the truth of the pretence could be proved. The question might, it is true, have been put more pointedly, but it really comes to mean this: When you got the letter, what was your honest opinion as to its meaning? And when to that question there was the answer that the letter led the prosecutor to the conclusion that the defendant was a farmer, then the construction of the letter as to its real meaning was for the jury, while the question of what was the prosecutor's belief was one for him to answer. The point raised is really a question of the construction of the question that was put to the prosecutor, and though it might have been better framed, I think the answer was admissible as evidence of the prosecutor's belief that the letter was true, though its effect with the jury might of course not be conclusive. As there is abundant evidence that the prosecutor parted with his goods on the faith of the letter being true, I think there is no ground for quashing the conviction on that point.

No question is raised as to the summing-up or as to the sentences, though if we saw on the case a clear illegality in the sentences pronounced we should be bound to take notice of it; there is no necessity, however, to do so in the present case. The first count is good: the defendant was found guilty upon it on evidence which it is impossible to quarrel with, and he has received a sentence less than the maximum that might have been imposed; the judgment on that count, therefore, is right. As to the concurrent sentences, the question is really immaterial, and it is unnecessary to discuss it: if there was power to pass concurrent sentences, the Court was right; if there was not, it is in the circumstances of the case wholly immaterial.

I should like, although the question does not arise in the case, to take the opportunity of correcting a misapprehension which commonly exists in cases where a man who has been released on a ticket-of-leave or conditional licence is tried and convicted of another offence. Under one of the penal servitude

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Hawkins J.

Acts he is liable to be sent back to penal servitude to serve out what I may call his remanet sentence after undergoing his new sentence. There is no power in the tribunal which tries him to make the remanet sentence run concurrently with the new, or the new concurrently with the remanet sentence, although not infrequently the sentences are in fact ordered by the tribunal which passes the new sentence to run concurrently: the section, however, says in unmistakable terms that the remanet sentence is to be served out after undergoing the punishment for the subsequent offence. (1) In such a case the only way in which the remanet sentence can be mitigated is by an application to the Home Secretary.

The case raises another point. There was a separate indictment against the prisoner for larceny of the same goods which he had been convicted of obtaining credit for by false pretences, and after his conviction upon the first he was put upon his trial upon the second indictment. He protested against being tried for the larceny after conviction for the misdemeanour; but his objection was overruled, and he was convicted and sentenced to six months' hard labour, to run concurrently with his sentence on the other indictment. I am of opinion that the second trial ought not to have taken place, and that the objection was good. The man had clearly been convicted of a misdemeanour in respect of obtaining credit for the same goods which were the subject of the charge of larceny; and it is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts: the offences are practically the same, though not their legal operation. The course adopted is altogether inconsistent with what is right and just; and though the defendant will in fact get no practical advantage from our decision, he is entitled to have this second conviction quashed.

CAVE J. I am of the same opinion. The case as drawn is somewhat confused, but at bottom the questions raised by it are those which have been dealt with by my brother Hawkins. The first question for us is whether the question which was put to the witness as to the inference which he drew

(1) See 27 & 28 Vict. c. 47, s. 9.

from the letter was admissible. I am of opinion that it was clearly admissible, and that it was absolutely necessary to a conviction. The case of *Reg.* v. *Cooper* (1), so far from bearing out the contention on behalf of the prisoner, is inconsistent with it. The judgments in that case say that it must be shewn not only that the false pretence was made, but that the prosecutor believed it to be true and parted with his property because he so understood it. In a case like the present the charge could not be proved without putting the question in some such form as that in which it was put. It is quite clear that the evidence was admissible, and that the defendant was properly convicted. The second question is, whether the defendant, having been convicted on the charge of false pretences, could on the same facts be convicted of stealing. There is only one answer: he clearly could not.

GRANTHAM J. I am of the same opinion. It is quite true that it was for the jury to say whether the inferences drawn upon reading this document by the prosecutor could reasonably be drawn; but it was necessary to find out whether the prosecutor was in fact misled by the statement; if he was not, the prisoner could not be convicted. The case of *Reg.* v. *Cooper* (1) is a clear authority in favour of the prosecution.

LAWRANCE J. I am of the same opinion.

WRIGHT J. I concur, subject to one reservation. The evidence might or might not be admissible according to the purpose for which it was offered. In order to convict the prisoner three things must happen: first, which is a question for the judge, whether the document is reasonably capable of bearing the meaning attributed to it; secondly, which is for the jury, whether it was so meant by the prisoner; and, thirdly, whether it was so understood by the prosecutor. If this evidence was offered under the second of these heads, its admission would be wrong; if upon the third, it would be right.

Conviction for misdemeanour affirmed.
Conviction for felony quashed.

(1) 2 Q. B. D. 510. W. J. B.

1896
Nov. 5.

VESTRY OF ST. MARY, BATTERSEA *v.* PALMER AND ANOTHER.

Metropolis — Management — "New Street" — Paving Expenses — Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 112.

By s. 105 of the Metropolis Management Act, 1855, the local authority may pave a new street and recover the expenses from the owners of the adjoining houses, where the owners of the houses forming the greater part of the new street are desirous of having it paved, or where the local authority deem it necessary or expedient that such street should be paved. By s. 77 of the Metropolis Management Act, 1862, where the local authority "under the powers given by s. 105" of the Act of 1855 pave a new street, the owners of land abutting on the street are made liable to contribute to the expense as well as the owners of houses.

A road, which had been laid out since the passing of the Act of 1862, and was therefore a new street within the definition in s. 112 of that Act, had upon one side a house and no other building, and upon the other side a house at one end and a chapel and hall at the other; no new buildings had been erected upon either side of the road for more than twenty years, nor was there any probability of the vacant plots of land on either side being built upon for some years:—

Held, that a magistrate was justified in finding that the road was not a new street for the purposes of s. 105 of the Act of 1855 or s. 77 of the Act of 1862, and that the local authority could not, therefore, recover from the frontagers the expenses of paving the road.

CASE stated by a metropolitan police magistrate.

The respondents had been summoned to answer the claim of the appellants for 105*l.* 0*s.* 6*d.*, being the sum apportioned by their order, dated December 11, 1895, in respect of certain premises of which the respondents were the owners, being the proportion alleged to be payable in respect of such premises towards the expenses of paving a new street known as Ramsden Road. The following facts were proved or admitted on the hearing of the summons.

The appellants were a vestry within the meaning of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), and the statutes amending the same. Ramsden Road, which was considerably over half a mile in length, lay partly within the appellants' district and partly within the district of the

Wandsworth Board of Works; the present proceedings were only concerned with the former portion. The whole road was a highway, and was formed and laid out as a road or roads in or after the year 1866. The Wandsworth portion had been considerably built upon, though the precise extent of such building did not appear. The respondents were the owners and occupiers of two plots of land situated in and abutting on the Battersea portion of the road.

On November 14, 1894, the appellants deemed it necessary and expedient and resolved to pave so much of Ramsden Road as lay within their district; they accordingly did the work, and on December 11, 1895, apportioned the cost among the owners of the houses and land bounding and abutting on the road; the proportion charged to the respondents was 105*l.* 0*s.* 6*d.* The appellants had in 1893 executed certain temporary repairs in the Battersea portion of the road under the powers of s. 3 of the Metropolis Management (Amendment) Act, 1890 (1), and their object in paving it in 1894 was to obviate the necessity of making repeated applications to the adjoining owners under that section for the cost of current repairs.

The Battersea portion of the road was about 200 yards long. On the west side there was only one building, a house; on the east side at the south end a house, and at the north end a church and hall; they were the only buildings in that portion of the road, on which no new buildings had been erected for the last twenty years. There was no probability of the vacant plots of land in the road being built upon for at least some years.

On behalf of the appellants it was contended that the Battersea portion of Ramsden Road was a street within the meaning of 18 & 19 Vict. c. 120, s. 250, and that it had been laid out and formed since the passing of the Act 25 & 26 Vict. c. 102, and was therefore in law a new street within the meaning of 25 & 26 Vict. c. 102, s. 112; and that the appellants were therefore entitled to pave it when they deemed it necessary or expedient, and to recover the cost and expenses from the owners of the houses and land abutting on or bounding the road.

(1) 53 & 54 Vict. c. 66.

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On behalf of the respondents it was contended that, in the absence of any unusual features or circumstances, before any road became a new street within the meaning of 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, a substantial part of at any rate one side of the road must be occupied by buildings, and the cases of *St. George's Local Board* v. *Ballard* (1), *Gozzett* v. *Maldon Urban Sanitary Authority* (2), and *Davis* v. *Greenwich Board of Works* (3), were cited.

The learned magistrate found, if necessary, as a fact that the Battersea portion of Ramsden Road had not been built upon to such an extent as to have become a street in the popular sense of the term. He dismissed the summons on the ground that the Battersea portion was not a new street within the meaning of the two sections above referred to, and that the appellants had acted prematurely in paving it as such.

The question for the Court was whether on the facts and finding stated in the case the decision was right in law. (4)

J. C. Earle (*Channell, Q.C.*, with him), for the appellants. The magistrate was wrong; the proper test to apply was not

(1) [1895] 1 Q. B. 702.

(2) [1894] 1 Q. B. 327.

(3) [1895] 2 Q. B. 219.

(4) By s. 105 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), "In case the owners of the houses forming the greater part of any new street laid out or made or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same . . . , and the owners of the houses forming such street shall, on demand, pay to such vestry or board" the amount of the estimated expenses. The Act contains no definition of "new street," but by s. 250 "street" includes (inter alia) any highway (except the carriage-way of any turnpike road) and any road, and a part of any such highway or road.

By s. 77 of the Metropolis Local Management Acts (Amendment) Act, 1862 (25 & 26 Vict. c. 102), "where any vestry or district board shall, under the powers given by s. 105 of the firstly-recited Act, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein . . . ."

By s. 112, "new street" applies to and includes "all streets hereafter to be formed or laid out, and a part of any such street. . . ."

whether this road was a new street in the popular sense of the term, but whether it came within the definition of new street contained in s. 112 of the Metropolis Management Amendment Act, 1862. Had the road been an old highway before the passing of that Act, the finding of fact by the magistrate would have disposed of the case, but, being a street formed and laid out since that Act, it comes in terms within the purview of s. 112. It is immaterial whether there was a single house in the road.

Freeman, Q.C. (*Daldy* with him), for the respondents. Assuming that this road comes within the definition of a new street in s. 112 of the Act of 1862, the summons was properly dismissed. The power of local authorities in the metropolitan area to do paving works and apportion the expenses is derived from s. 105 of the Metropolis Management Act, 1855, which in terms anticipates that there will be owners of houses in the street, among whom the apportionment must be made. It limits the power to new streets laid out in a certain way. It is true that s. 77 of the Act of 1862 gives the local authority power to apportion the expenses among owners of land as well as of houses, but the section only applies where the work is done under the powers given by s. 105 of the Act of 1855—that is to say, where there is a street composed wholly or partially of houses. The scope of that section is not widened by s. 77 of the later Act, although the apportionment may be made among a larger class of persons in appropriate cases. [He cited *Pound* v. *Plumstead Board of Works* (1); *Robinson* v. *Barton-Eccles Local Board* (2); *Davis* v. *Greenwich Board of Works*. (3)]

Earle, in reply.

GRANTHAM J. I am of opinion that the learned magistrate was right in refusing to make the order asked for by the appellants, although it may be that he was not quite right in some of the reasons which he gave for his decision. Although the argument on behalf of the appellants was correct in contending

(1) (1871) L. R. 7 Q. B. 183. (2) (1883) 8 App. Cas. 798.
(3) [1895] 2 Q. B. 219.

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that s. 105 of the Metropolis Management Act, 1855, was extended by s. 77 of the Act of 1862 as far as concerns the powers of a local authority to recover money expended by them, for the latter section enables them to recover a proportion of the expenses from the owners of land adjoining a new street as well as from the owners of houses, yet the argument for the appellants was necessarily based on the assumption that the local authority were justified in acting solely upon s. 77, and that they were not remitted back to the power conferred by s. 105 of the earlier Act. With that contention I cannot agree. Sect. 77 of the Act of 1862 says distinctly, "where any vestry or district board shall, under the powers given by s. 105 of the firstly-recited Act, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable," &c. All that s. 77 seems to have effected is that it has extended the powers of the authorities so as to enable them to charge the owners of land as well as the owners of houses; it was not intended to give them powers to make the owners of land exclusively, or practically exclusively, defray the paving expenses, which would happen in the present case, there being only two houses in this street, both of them old ones, and no present prospect of any more being built. We have, therefore, to refer back to s. 105 of the Act of 1855 to see what the power is, and there we find that "in case the owners of the houses forming the greater part of any new street laid out or made or hereafter to be laid out or made, which is not paved to the satisfaction of" the local authority, &c., the latter may do the work, as they may "if they deem it necessary or expedient that the same should be so paved." That section applies where there are houses upon both sides or upon one side of a street; but it does not seem to give the local authority power to pave a street where there are no houses, or houses only to the extent existing in the present case. Although, therefore, I do not think we should be justified in deciding this case upon the simple question whether this road is a new street in the popular sense, I think that on the principle of law the learned magistrate was right in refusing to make an order. The appeal must, therefore, be dismissed.

WRIGHT J. I am of the same opinion. I agree with the contention on behalf of the appellants that this street is, or may be, for some purposes a new street; but the question is whether it is a new street for the purposes of s. 105 of the Act of 1855 or s. 77 of the Act of 1862. I cannot feel any doubt upon the language of the sections, although the question is a very important one—important because, as has been pointed out, this particular road is only a section in the middle of a long road, and it may be most inconvenient that a portion of a long road should be imperfectly paved while the rest is properly done; we cannot, however, help that. When s. 105 is carefully looked at, it is obvious that it not merely begins by treating houses as the essence of what is a street for the purposes of the section, but later on it goes on to use this expression: "and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses." Clearly when that section was passed the Legislature was thinking of a street composed wholly or partially of houses; and I should say that the question whether there was a sufficient number of houses to make a road a street for the purposes of that Act would be a question of fact for the magistrate. Then we come to s. 77 of the Act of 1862, which provides that the local authority may charge persons whose land has no houses upon it. I do not think that widens the scope of the section. The question is a very important one from every point of view; but I do not think that there is any real doubt as to the proper interpretation of the statutes. (1)

Appeal dismissed.

Solicitors for appellants: *W. W. Young & Son.*

Solicitors for respondents: *Simpson, Palmer & Winder.*

(1) There was a further appeal of *Vestry of St. Mary, Battersea* v. *Metchim*, which differed only in the fact that the respondent was the owner of one of the two houses in the road; by agreement the decision followed that in the present case.

W. J. B.

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[IN THE COURT OF APPEAL.]

WEST OF ENGLAND FIRE INSURANCE COMPANY *v.* ISAACS.

Insurance, Fire—Contract of Indemnity—Remedies of Assured against Third Parties—Right of Insurer to Subrogation—Renunciation of Remedies by Assured—Right of Insurer to recover Value of Remedies renounced.

A policy of fire insurance being a contract of indemnity, the insurer is entitled to recover from the assured, not merely the value of any benefit received by him by way of compensation from other sources in excess of his actual loss, but also the full value of any rights or remedies of the assured against third parties which have been renounced by him and to which, but for such renunciation, the insurer would have a right to be subrogated.

Appeal from the judgment of Collins J., reported [1896] 2 Q. B. 377.

The plaintiffs, an insurance company, paid to the defendant a sum of 100*l.* in respect of a claim under a policy of insurance arising under the following circumstances. Certain premises were demised for a term to expire in December, 1894, the lease containing covenants by the lessee to repair and leave in repair, and also to insure in the Royal Exchange Assurance Corporation in the joint names of the lessors and lessee. Under this lease one Bennett became lessee and effected a policy on the premises in the above-mentioned office in the joint names of himself and the lessors. He then sub-let to the defendant a warehouse, which was part of the premises, for the residue of the term less ten days. The sub-lease contained covenants on the part of the defendant to repair and leave in repair, and a covenant by Bennett, the lessor, to insure the premises, and to lay out the moneys received under any insurance policy in making good damage by fire, with a proviso that if such moneys proved insufficient the defendant was to remain liable, under his covenant to repair, to make good the deficiency. The defendant effected, in his own name, an insurance against fire with the plaintiffs upon the warehouse demised to him by the sub-lease. During the existence of the sub-lease a fire happened by which the warehouse was damaged. Bennett had died

before the fire took place, and subsequently to that event Bennett's interest became vested by order made in the Chancery Division of the High Court in one Jones. Notice to repair, accompanied by a specification or schedule of dilapidations, was given under the original lease by the lessors to Jones, who in turn gave notice to repair, with a schedule of dilapidations, to the defendant. Jones died shortly afterwards, and his executors demanded payment from the Royal Exchange Office of 100*l.*, the amount at which the fire damage to the warehouse had been agreed by both insurance offices and the defendant. The plaintiffs were sued by the defendant upon their policy, and paid him 100*l.*, the agreed amount of the damage to the warehouse. At that time the plaintiffs admittedly knew of the existence of the Royal Exchange policy.

Subsequently to the above proceedings and in December, 1894, the lease expired. Later on the original lessors brought an action against Jones' executors to recover damages for breaches of the covenant to repair contained in the original lease, and thereupon Jones' executors brought a similar action against the defendant for breach of the covenants in the sub-lease. The first-mentioned action was settled by payment of a sum of 250*l.*, and the action by Jones' executors against the defendant was settled by his paying 140*l.* to Jones' executors, who gave him a receipt for all claims under the schedule of dilapidations, which included damage by fire. The defendant at the same time undertook not to bring any action against Jones' executors for breaches of covenant contained in the sub-lease. Jones' executors pressed their claim against the Royal Exchange Office under their policy, and the company paid 100*l.* in discharge of their liability.

This action was brought by the plaintiffs to recover 100*l.* from the defendant, upon the ground that on settling with Jones' executors the defendant had had the benefit of the payment made under the Royal Exchange policy, or of the covenant in the sub-lease on the part of the predecessors in title of Jones' executors, or, alternatively, that the defendant was bound to make good to the plaintiffs the full value of the rights against his lessor which, for his own reasons, he had renounced, to

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which rights, but for such renunciation, the plaintiffs would have been entitled to be subrogated.

The learned judge gave judgment in favour of the plaintiffs. (1) The defendant appealed.

Channell, Q.C., and *Edward Pollock*, for the defendant. The defendant gave up no right, or if he did give up any right it was valueless. When Jones' executors sued the defendant both the terms under the lease and the sub-lease had come to an end, and the executors could not reinstate the premises. Consequently, an action by the defendant against them could not have resulted in more than nominal damages. In *Darrell* v. *Tibbitts* (2), Cotton L.J. says: "If the company had known of the covenants in the lease, and of the actual position of the parties, it might have been said that they paid without requiring the covenant to be enforced, and therefore had lost their remedy." Here it is clear that the plaintiffs knew of the covenants in the sub-lease, and by paying with that knowledge they lost their right to take advantage of these covenants. The law laid down by the learned judge is not disputed, but only its applicability to the facts.

Cohen, Q.C., and *Wood Hill*, for the plaintiffs. The full loss has been paid by each of two insurers. One of them, the Royal Exchange Office, could not avoid paying, and, consequently, the other, the plaintiffs, are exempt, and can recover back the money they have paid to the defendant. The defendant got the benefit of giving up the claim under the sub-lease, because by agreeing to do so he paid less than he would otherwise have been obliged to pay. That benefit is properly measured by the agreed amount of the damage by fire—that is, 100*l.*

[They cited *North British and Mercantile Insurance Co.* v. *London, Liverpool and Globe Insurance Co.* (3) and *Castellain* v. *Preston.* (4)]

Channell, Q.C., in reply. The payment of 100*l.* by the plaintiffs to the defendant covered his liability to his lessors, and therefore covered their loss, so that they were not entitled to call on the Royal Exchange Office to pay anything, and their

(1) [1896] 2 Q. B. 377.
(2) (1880) 5 Q. B. D. 560.
(3) (1877) 5 Ch. D. 569.
(4) (1883) 11 Q. B. D. 380.

having paid cannot affect the rights of the plaintiffs and the defendant between themselves.

LORD ESHER M.R. In this case there were some premises insured against fire in two insurance offices, and there has been a fire, and in respect of that each of the offices has paid 100*l*. The question is whether that state of things can stand. For the plaintiffs it is said that the cases shew that that situation must be got rid of, and I think it can be by the application of well-known principles.

The action is by one of the insurance companies, and the plaintiffs do not say that they were not bound to pay on their contract; but they say that on their doing so any remedy which the defendant had against anybody in respect of the damage is subrogated to them, and that the defendant had no right to deal with such a claim to the prejudice of the plaintiffs. That proposition is not disputed on behalf of the defendant. Did he, then, deal with any rights he had against third parties? He had a right against the person who was in the position of being the lessor at that time arising out of a covenant in the lease that the lessor would insure the premises against loss by fire, and expend any money received under the insurance as far as might be necessary in restoring the damage done by the fire. There was some suggestion that there was no one whom the defendant could have sued on that covenant; but the position at the time of the fire was that Jones had taken upon himself the fulfilment of the covenant, and that the defendant had agreed to be tenant upon these terms. The lessor was bound to endeavour to recover from the Royal Insurance Company, and to spend any money recovered in putting the premises to rights. If that had been done before the present plaintiffs had been called on to pay, as they were only bound to indemnify the defendant, they would not have had to pay anything. They now say that, having paid under their policy, they are entitled to the right which the defendant had to insist that Jones should expend the money he had received in repairing the damage done by the fire, and that they ought to be in a position to force Jones to do this, or to recover damages from him for his breach of covenant in not doing it. Inasmuch as the damage

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by the fire was agreed at 100*l.*, they say that would be the amount of damages that they would have been entitled to recover from Jones. The defendant has given up this right of action against Jones, so that the plaintiffs can never recover that amount, and the course taken by the defendant has damaged the plaintiffs to that extent. The plaintiffs claim that this gives them a right to recover that amount in their action. That was the view taken by the learned judge; and it seems to me that it is perfectly right, and in accordance with the law of insurance. I think, therefore, that the plaintiffs were entitled to succeed, and that the appeal should be dismissed.

LOPES L.J. I am of the same opinion.

RIGBY L.J. I agree. I wish to say a few words about the position of the lessor and the lessee. Under the sub-lease there was a general covenant to repair and to yield up in repair; but a special provision was made, for the case of damage by fire, that the lessor should insure against such damage and should lay out all moneys received in respect of such insurance in rebuilding or reinstating the premises destroyed or damaged. Then came a proviso that the lessee should remain liable to make good any damage which the money received by virtue of any such insurance should be inadequate to repair. The liability of the lessee to the lessor was to make good any damage that the 100*l.*, the agreed amount in this case, would not cover, and he was entitled to insist on the 100*l.* being expended on the repairs. He has so dealt with the lessor that no one can now get the 100*l.*, for he has already got the full benefit of it. The substance of the thing is that he paid 140*l.* without requiring that diminution of liability to which he was entitled. He may have got the full 100*l.* or more; but at any rate, he so dealt with the insurance that the plaintiffs cannot obtain it from the lessor, and they are entitled to recover it in this action.

Appeal dismissed.

Solicitors for plaintiffs: *Dawes & Sons.*
Solicitors for defendant: *W. & W. Stocken.*

A. M.

[IN THE COURT OF APPEAL.]

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ATTORNEY-GENERAL *v.* BARON WOLVERTON.

Revenue—Succession Duty—Annuity—Succession conferred by Annuity—Interest created by Family Settlement—"Alienation"—Contract for Valuable Consideration in Money or Money's Worth—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15, 17, 18.

A peer by his will bequeathed bank shares on certain trusts to his nephew, who was heir to the title, and devised his residuary estate in trust for his wife for life, and after her decease in trust for the nephew if then living, but if he should be dead in trust for the person who should then be the testator's right heir at common law. The nephew succeeded to the title but died without issue in the lifetime of the widow, and the bank shares thereupon fell into residue. He was succeeded in the title by the defendant. The testator left five nieces who, in the event of their surviving, would be, at the death of the widow, the testator's co-heiresses, but in the event of their all dying without issue in the lifetime of the widow, leaving the defendant surviving, he would be the testator's heir. A deed of arrangement was executed by which the widow assigned her interest in the bank shares, and the nieces and the defendant assigned their respective interests under the will, to trustees upon (inter alia) the following trusts: by clause 1, an annuity of 15,000*l.* was during the life of the widow to be paid to the defendant for his life, out of the income of the bank shares; by clause 2, after the death of the widow the trustees were, out of the income of the whole of the settled property, and until the determination of certain trusts for accumulation under the deed, to "continue to pay the said annuity of 15,000*l.*" to the person for the time being holding the title. Upon the death of the widow the Crown claimed succession duty from the defendant in respect of the annuity to which he became entitled under clause 2:—

Held, affirming the judgment of the Divisional Court, that the annuity under clause 2 was not the same as that created by clause 1, as they were charged upon different funds, and subject to different limitations, and that the second annuity conferred a succession on the defendant within the meaning of s. 2 of the Succession Duty Act, 1853; that s. 15 of the Act did not apply because such a family settlement is not an "alienation" within that section, and because the section only applies to an alienation not conferring a new succession; that the defendant was not a party to "a contract made for valuable consideration in money or money's worth" within s. 17 of the Act; that the payment of legacy duty by the nieces did not create an exemption under s. 18; and that succession duty was payable.

APPEAL from a judgment of a Divisional Court, reported [1896] 2 Q. B. 389.

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An information was filed by the Attorney-General against the defendant, praying that it might be declared that upon the death of Georgiana Maria Julia, Lady Wolverton, succession duty at the rate of 6½ per cent. under 16 & 17 Vict. c. 51, and 51 & 52 Vict. c. 8, s. 21, and estate duty under 52 & 53 Vict. c. 7, s. 6, became payable in respect of the value of an annuity of 15,000*l.* per annum, to which the defendant, as the person for the time being holding the title of Baron Wolverton, became entitled in possession under the trusts declared by clause 2 of an indenture of December 31, 1888, out of the income of trust funds in the indenture called "the settled property." The facts stated on the information are fully set out in the report in the Court below, and were shortly as follows:—

George Grenfell, second Baron Wolverton, by his will bequeathed all his share and interest in a banking company to his nephew Henry Richard Glyn, who was heir-presumptive to the title, upon trust to receive the annual produce thereof until January 31, 1892, if he should so long live, and to invest so much of that produce as in any year exceeded 15,000*l.* per annum in the names of himself and another trustee, and to accumulate the produce thereof in like manner for his own use and benefit until January 31, 1892. The testator bequeathed his residuary estate to his wife for life with remainder to Henry Richard Glyn, if living, but, if not, to the person who should then be the testator's right heir at common law.

The testator died, and was succeeded by Henry Richard Glyn, who died before January 31, 1892, without issue and in the lifetime of the widow of the testator, and was succeeded in the title by the present defendant. Legacy duty was paid on the whole of the testator's estate. Five sisters, nieces of the testator, were then living, and in the event of their surviving the widow they would be the testator's co-heiresses at law. In the event of their all dying without issue in the lifetime of Lady Wolverton, the defendant, if he survived, would have been the testator's heir. Thereupon a deed of arrangement was entered into between the widow, the five nieces, the defendant, some other persons as trustees of marriage settlements of some of the nieces, and certain persons as trustees of this deed.

The deed stated that it was apprehended that according to the true construction of the will no part of the residuary estate of the testator, including the bank shares (which on the death of Henry Richard Glyn had fallen into residue), would, except in the event of all the nieces dying in the lifetime of Lady Wolverton without leaving issue, at her death, devolve or come, under the trusts of the will, to the person for the time being holding the title of Baron Wolverton, contrary to the supposed intention of the testator. The deed then stated that, with the object of carrying into effect the supposed intention of the testator, Lady Wolverton assigned her life interest in the bank shares, the nieces assigned their respective shares and interests in the residuary estate of the testator, including the bank shares, and the defendant assigned his contingent interest in the residue to the trustees of the deed, to be held upon the trusts thereinafter declared.

The trusts of the property so assigned and called "the settled property" were (so far as is material to be here stated) as follows: By clause 1, subject to the life interests of Lady Wolverton, the settled property was to be held upon trust to pay out of the income during the life of Lady Wolverton an annuity of 15,000*l.* to the defendant for life, determinable in certain events, an annuity of 1500*l.* to each of two of the nieces who were married, and an annuity of 1000*l.* to each of the others, to be increased on marriage to 1500*l.* There was also a trust to retain a certain sum per annum of the income of the settled property to form an "accumulated fund."

By clause 2, after the death of Lady Wolverton, until the sums of 100,000*l.*, thereinafter mentioned, were satisfied, and until the trust for accumulation should have ceased, the trusts of the settled property were as follows: After payment of duty out of the annual income to continue to pay the said annuity of 15,000*l.* (which "continuing annuity" was thereinafter called "the said annuity") in like manner as thereinbefore provided with regard to the defendant, to the person for the time being holding the title of Baron Wolverton during his life. Then followed trusts for investment of the accumulated fund, and upon the death of Lady Wolverton for the payment to each of

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the nieces of 100,000*l.*, with further trusts in case the accumulated fund should not at that time be sufficient to make these payments to further accumulate until that object was effected. The ultimate trust was to invest in freehold hereditaments to be held to the use of the defendant during his life, with remainders in tail male and remainders over.

The defendant enjoyed the annuity under clause 1 until the death of Lady Wolverton. The accumulated fund was not then sufficient to meet the charges on it, and the trusts for accumulation continued. The defendant, as the person for the time being holding the title of Baron Wolverton, thereupon became entitled under clause 2 to the annuity of 15,000*l.* mentioned therein.

The claim of the information was that, under these circumstances, succession and estate duty became payable in respect of the annual sum of 15,000*l.* which the defendant became entitled to receive under clause 2 from the date of Lady Wolverton's death until the trust for accumulation should cease.

The Divisional Court (Pollock B. and Bruce J.) gave judgment in favour of the Crown. (1)

The defendant appealed.

Cozens-Hardy, *Q.C.*, and *Cripps*, *Q.C.* (*Danckwerts* with them), for the defendant. No new interest came into existence under the deed upon the death of Lady Wolverton, but the annuity which was to "continue" was still paid to the defendant. Consequently no new succession arose, and no succession duty was payable. Even if the deed were treated as creating two annuities, no new succession arose on the death of Lady Wolverton. The defendant took part of the interest of the co-heiresses in the residuary estate, and as legacy duty had been paid he is exempt from succession duty by reason of s. 18. An alienation does not prevent there being a succession, but it does not create one: *Solicitor-General* v. *Law Reversionary Interest Society*. (2) If the interest of the co-heiresses had been a reversionary interest in realty, and they had in the

(1) [1896] 2 Q. B. 389. (2) (1873) L. R. 8 Ex. 233.

life time of Lady Wolverton assigned to the defendant, there would upon her death only have been one succession. This being personalty, legacy duty was paid upon it, and the scheme of s. 18 is that only one duty should be payable in respect of one death. It cannot make any difference that the defendant is alienee of only part of the interest of the co-heiresses.

With regard to the question whether there has been an alienation, the case of *Attorney-General* v. *Cecil* (1), if rightly decided, is distinguishable, and some observations of Kelly C.B. in his judgment, as reported elsewhere (2), are in favour of the defendant, as is also the opinion of Lord Wensleydale in *Braybrooke* v. *Attorney-General.* (3) *Attorney-General* v. *Littledale* (4) shews that s. 15 does not impose a new duty. The defendant was alienee of the co-heiresses, but the alienation did not confer a new succession. He was also a purchaser for value within s. 17, as he gave up his contingent interest in the whole of the residue: *Floyer* v. *Bankes* (5); *Oldfield* v. *Preston.* (6)

The Solicitor-General (*Sir R. B. Finlay*), (*The Attorney-General* (*Sir R. E. Webster*) and *Vaughan Hawkins* with him), for the Crown. The annuity during the life of the widow and that after her death were not the same. The former was given to a specific person, and if he had died during the life of the widow it would have lapsed. It was charged on the bank shares only and not on the whole estate, as in the second case. There being two annuities, the second in point of time created a new succession. Sect. 18 does not apply even if the case is brought within s. 15, for the same person did not pay legacy duty, as is now required, to pay succession duty. It is not a case of the same acquisition of the same property: *Attorney-General* v. *Mitchell.* (7) Sect. 15 does not apply where, as in this case, a new succession is created by the instrument: *Attorney-General* v. *Cecil* (1); *Fryer* v. *Morland* (8); *In re Cooper and Allen's Contract for Sale to Harlech.* (9)

Cozens-Hardy, Q.C., in reply.

(1) (1870) L. R. 5 Ex. 263.
(2) (1870) 23 L. T. (N.S.) 20.
(3) (1860) 9 H. L. C. 150.
(4) (1871) L. R. 5 H. L. 290.
(5) (1863) 3 D. J. & S. 306.
(6) (1862) 3 D. F. & J. 398.
(7) (1881) 6 Q. B. D. 548.
(8) (1876) 3 Ch. D. 675.
(9) (1876) 4 Ch. D. 802.

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LORD ESHER M.R. Without recapitulating the facts of this case, I propose to consider whether any of the sections of the Act are applicable to it. Taking them in an inverted order, it is admitted that s. 18 does not apply unless the case can be brought within s. 15. It may be that even if the case were within s. 15 the s. 18 would not apply; but if we decide that it is not within s. 15 there is no occasion to consider the other section.

We have already expressed our opinion that s. 17 does not apply to a family settlement like this, in which there is not a contract between any parties such as is described in that section; so that our decision must turn on ss. 2 and 15.

It is argued that the case does not fall within s. 2 because there is but one annuity, a continuing one. If, therefore, we determine that there are two annuities, and not a continuing one, that argument falls to the ground, and the case is primâ facie within s. 2. If the case is primâ facie within s. 2, is it within s. 15? It is said on the part of the Crown that it is not, on the ground that we ought to construe s. 15 according to the view of Martin B. in *Attorney-General* v. *Cecil* (1), which was that s. 15 refers, not to the creation of an interest by way of settlement, but to an alienation in the ordinary sense, as, for instance, by the sale of the whole of the interest, before it came into possession, to a third person. It is also said that even if there is an alienation it is one which does confer a new succession, and so is not within the section. We must then consider what the deed was. There was a succession created by the first annuity, and the question is whether there was a new succession arising out of the annuity described in the second clause. Supposing we do not decide upon the larger proposition of Martin B., it is said there was a new succession because the annuities are in favour of different persons. That seems to me to be true. The first was in favour of a particular Lord Wolverton, and the second in favour of the Lord Wolverton for the time being. Then it is said that the annuities are payable from different sources. The first is payable out of the estate of Lady Wolverton, and the second out of that of the

(1) L. R. 5 Ex. 263, at p. 272.

co-heiresses, and this latter was a larger fund than the former. There was, then, a new succession, and it follows that either upon the proposition of Martin B., or, if that is not adopted, then upon the objection that there are two successions, this case is not within s. 15. If it is within s. 2 and not within s. 15, it is admitted that the contention on behalf of the Crown is right.

I flinch from deciding what is to be the construction of this Act in all succeeding cases, though the principles on which we decide this case will determine all others which can be brought within the circumstances of this particular case. As to what those principles are, we have to choose between the view of Martin B. and that of Lord Wensleydale in *Braybrooke* v. *Attorney-General*. (1) I find that Martin B. laid down a proposition which is clear in the terms, and was not dissented from by any other of the learned judges, while Lord Wensleydale's proposition was dissented from by all the other Lords who heard the case; and, with all the deference that is due to an opinion of Lord Wensleydale, I feel bound to adopt that of Martin B. Even if I were not ready to do so, it seems to me that it is clear from the circumstances of this case that for the reasons that have been given there was a new succession, and that s. 15, which only deals with cases in which there is not a new succession, does not apply. I am of opinion, therefore, that the appeal should be dismissed.

LOPES L.J. In this case we have to deal with two clauses in a family settlement which relate, according to the contention on the part of the Crown, to two annuities, and according to the contention for the defendants, to one annuity. The material question is, Which of these views is correct? The annuity under clause 2 of the deed is expressed to be granted out of the estate of the co-heiresses, while that under clause 1 is granted out of the life estate of the widow in certain bank shares. The annuities, therefore, arise out of different funds and at different times, and further, they are limited in favour of different persons. I come, therefore, to the conclusion that the contention that

(1) 9 H. L. C. 150.

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there is only one annuity is not tenable, but that there are two distinct annuities. If so, I take it that it is clear there must be, in the case of the second annuity, a succession within s. 2 of the Act.

I am inclined to think that concludes the case; but it is said that s. 15 applies. In my opinion that is not so, for s. 15 applies only where the alienation is one not conferring a new succession.

The only other sections which have been discussed are ss. 17 and 18. It is admitted that s. 18 can have no application unless the case can be brought within s. 15. As to s. 17, it seems to me to be impossible to contend with success that a family arrangement such as this can be brought within the words used in that section. The section deals with "contracts," and such a settlement cannot properly be termed a "contract."

The result is, that the Crown is in the right, and that the appeal ought to be dismissed.

RIGBY L.J. I am of the same opinion. With regard to the question of there being a continuing annuity, I do not think it necessary to add anything. As to s. 17, I cannot see anything like a contract for payment of money on the death of the dowager. The question, then, is whether s. 15 is applicable or not.

In the first place, I adopt the decision of Sir George Jessel M.R. in *In re Cooper and Allen's Contract for Sale to Harlech* (1), with reference to the connection of the word "alienation" with the words "not conferring a new succession." In this I am supported by the view of Lord Wensleydale in *Braybrooke* v. *Attorney-General* (2), whose opinion was cited on another point, and I think I may say that this view has been taken over and over again.

Looking at the words of the section, "alienation or other disposition not conferring a new succession," the obvious meaning is that the Legislature intended to deal with cases which did not create new successions, because if they did not deal with such cases the Crown might lose duty to which it is entitled.

(1) 4 Ch. D. 802. (2) 9 H. L. C. 150, at p. 178.

Putting aside s. 15 for the moment, the question arises whether s. 2 applies in this case.

There are certain co-heiresses who, in the events that have happened, may be treated as the owners, subject to the life interest of the Dowager Lady Wolverton in the residue of the personalty of the testator. That being so, they create an annuity which is vested in the defendant. He takes it from them by virtue of a settlement, and comes plainly within the language of the section.

Returning to the consideration of s. 15, if it is possible to find an instance of alienation which would not create a new succession, the clause is satisfied, and it has been pointed out that there is such a case. There may be more; but one is where the whole property is sold out and out.

I may add that I am in accord with Martin B. in the view that s. 15 was not intended to include under the expression "alienation" such an arrangement as this in the nature of a family settlement notwithstanding the dictum of Lord Wensleydale which has been referred to. I rely, however, principally on the fact that there is a succession with regard to the second annuity within s. 2, so that s. 15 is not applicable.

Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for defendant: *Waterhouse, Winterbotham, Harrison & Harper.*

A. M.

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Dec. 2.

[IN THE COURT OF APPEAL.]

ENGELHART *v.* FARRANT & CO. AND T. J. LIPTON.

Master and Servant—Negligence of Servant—Liability of Master—Intervening act of Third Party—Effective Cause of Damage.

There is no rule of law to prevent a master being liable for negligence of his servant whereby opportunity was given for a third person to commit a wrongful or negligent act immediately producing the damage complained of. Whether the original negligence was an effective cause of the damage is a question of fact in each case.

The defendant employed a man to drive a cart, with instructions not to leave it, and a lad, who had nothing to do with the driving, to go in the cart and deliver parcels to the customers of the defendant. The driver left the cart, in which the lad was, and went into a house. While the driver was absent the lad drove on and came into collision with the plaintiff's carriage. In an action to recover for the damage caused by the collision :—

Held, that the negligence of the driver in so leaving the cart was the effective cause of the damage, and that the defendant was liable.

APPEAL from a judgment of the Divisional Court, affirming a judgment of a county court judge.

The action was to recover damages for injuries to the carriage of the plaintiff caused by the negligence of a servant of the defendant Lipton, hereinafter called the defendant. The defendants, Farrant & Co., had been dismissed from the action.

It appeared that a man of the name of Mears was employed by the defendant to drive a cart by which delivery was to be made of parcels of goods to customers of the defendant. A lad of seventeen called Tucker was employed by the defendant to go with the cart for the purpose of delivering the parcels, but he was not entrusted with the driving, and in fact had been forbidden to interfere with it. There was a lamp in the cart, and on a particular evening the oil gave out, and Mears drove to a house to get more oil. He left the horse and cart and went into the house. While he was gone Tucker drove on some distance, intending to turn the cart and return to the house. While driving he ran into the carriage of the plaintiff and damaged it.

The county court judge gave judgment for the plaintiff, and the Divisional Court, on appeal, affirmed his judgment.

The defendant appealed.

1896. Dec. 1. *J. Alderson Foote*, for the defendant. The mere fact that Mears left the cart and went into the house was not an act of negligence. If it were, the master can only be liable for the natural consequences of the negligent act of his servant, and it was not the natural consequence of Mears's act that Tucker should drive the horse and cart on. At the most it might be said that it was a probable contingency that Tucker would do so; but it was not found by the county court judge, and could not properly be found, that the wrongful intervention of a third person was the natural consequence of Mears's act. Such a wrongful intervention does not create any liability on the part of the master of the servant: *Limpus* v. *London General Omnibus Co.* (1) The judge considered he was bound by *Burns* v. *Poulsom* (2); but the cases are very different, because there the operation to be performed by the two men was of the same character, and they may be said to have been jointly engaged in it, while here the duty of driving was confined to Mears. The case of *Mann* v. *Ward* (3) is in point. In that case a cabman went to sleep inside his cab, and another man got on the box and drove off and caused an accident to a carriage. It was held that the owner of the cab was not liable. An illustration of the natural consequence of a negligent act is afforded by *Clark* v. *Chambers* (4), where an obstruction was left in a highway, and removed by a passer-by, and the person who left it there was held liable, because it was a natural act on the part of the passer-by to remove such an obstruction.

W. Howland Roberts, for the plaintiff. This is not the case of the intervention of a mere stranger. The two were employed on the same duty, that of distributing parcels, and both were in charge for the purpose of carrying out that duty. If that be the correct view, the defendant is liable for the

(1) (1862) 1 H. & C. 526; 32 L. J. (Ex.) 34.
(2) (1873) L. R. 8 C. P. 563.
(3) (1892) 8 Times L. R. 699.
(4) (1878) 3 Q. B. D. 327.

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negligence of Tucker. At any rate, Mears was negligent, and the interposition of the act of a third person does not prevent the defendant being liable. If Mears was negligent, and an independent person, Tucker, was also negligent, and both negligences contributed to the accident, there is an action against either. That is in accordance with the first proposition laid down by the Master of the Rolls in *The Bernina*. (1) If Mears had not left the horse and cart the accident would not have happened, and he is as responsible for leaving them in the hands of an incompetent person as he would be if he had left them unattended. [He cited *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (2) and *McCord* v. *Cammell*. (3)]

J. Alderson Foote, in reply. The defendant can only be liable for the negligence of Tucker if it occurred in the discharge of his duty, and that was negatived in the county court.

1896. Dec. 2. LORD ESHER M.R. This was an action for damage the result of negligent driving. It was brought in the county court, and tried by the judge without a jury, and the judge held the defendant liable for the damage which was done to the plaintiff's vehicle. The case is not a simple one: it comes on the border-line; but I think the decision of the county court judge was right.

The case depends on the doctrines that have been established with regard to the liability of an employer for the consequences of a negligent act of his servant; and, so far as the law is concerned, I cannot see that there is any difficulty; it is in applying the law to the facts that the difficulty arises.

The defendant, who is a tradesman, sent out a cart for the purpose of delivering parcels of goods which had been ordered. There was a young man of the name of Mears who was to drive, and a lad, younger than Mears, was in the cart, who was to deliver the parcels at the places to which they were addressed. The van went out with these two to deliver the parcels. The delivery was a joint matter—a joint service to be done by both of them; but the driving was only to be done by Mears, and it

(1) (1887) 12 P. D. 58, at p. 61. (2) (1887) 18 Q. B. D. 714.
(3) [1896] A. C. 57.

was no part of the other's duty to drive. He had been forbidden to drive, though I do not think that material except as shewing that it was no part of his service or duty to drive. On a particular evening, while they were carrying out these duties, the oil in the lamp inside the cart failed. Mears, if he had been properly careful, when he drove to a house to get more oil, should have made the lad get out and get the oil, and he himself should have remained looking after the horse and cart. Instead of doing that he left the duty he was employed to do to the lad, and I think it is a proper inference that he knew the lad could not drive. When Mears left the cart the lad did not drive away for his own amusement; he did that which he had no business to do, but he did it certainly with the intent to further the business, as he drove on and turned the cart, so that when Mears came out again time might be saved.

Now, for what is the defendant liable? He is liable for the negligence of Mears if that negligence was "an effective cause" of the subsequent damage to the plaintiff. Now, was it or was it not "an effective cause"? In this case, if there had been any doubt of its being an effective cause and the matter had been tried by a jury, the question must have been left to them. Here there was no jury, and it is a case in which, upon the finding of the county court judge, the Divisional Court, and we in this place, have a right to draw obvious inferences of fact. The question is, Was that negligence of Mears an effective cause of this damage to the plaintiff? It was argued that the mere fact of the second lad taking into his own hands to drive was sufficient to prevent the liability of the defendant, although Mears was negligent. That argument seems to me to be wrong. If a stranger interferes it does not follow that the defendant is liable; but equally it does not follow that because a stranger interferes the defendant is not liable if the negligence of a servant of his is an effective cause of the accident. Now, if it is necessary to draw any inference about the probability, if Mears had done what he ought to do and had thought what was the probable result of his going away and leaving the cart with the lad in it, I think it is inevitable to come to the conclusion that he would have thought he was doing a dangerous

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thing. Leaving that lad in the cart with the means of driving off at any moment makes what Mears did an effective cause of what happened afterwards. There was a case cited, in which I for one took part, of *Mann* v. *Ward*. (1) I doubt myself whether that case is fully reported. It seems to me extremely probable that there were some other facts in the case besides those put down in the report. But see what it was. It was a question of fact and not of law that we had to decide. There was a cabman who got drunk and got inside his own cab, and, I suppose, went to sleep; upon which, not a person whom he knew to be there, not a person who had anything to do with the cab, but some cabman off the street, as far as we can see, got on the cab. He was drunk and he drove away, not for the purpose of driving the cab anywhere where the right man would have driven it, but for his own purpose and for his own pleasure. The judge who tried the case with a jury came to the conclusion that no reasonable jury could find that the first drunken cabman, if he had thought about it at all, would have thought of another strange cabman getting on the cab and driving off. The judge thought no reasonable jury could find that, and, therefore, non-suited the plaintiff. Upon that question of fact the Court of Appeal declined to interfere. As I say, I suspect there was something more—some additional fact to those which have been reported; but, after all, it was only the decision of the Court of Appeal on a question of fact; and if the Court of Appeal was wrong in that case it is not a binding authority on this Court in this case.

In this case I think, according to all the ordinary rules, the defendant was liable for the negligence of Mears, and that the appeal should be dismissed.

LOPES L.J. read the following judgment:—The interposition of the negligence of another person between what I will call the primary negligence and the accident makes this case difficult.

In order that the plaintiff may recover, there must be negligence and negligence causing the injury. Mears was the driver

(1) 8 Times L. R. 699.

of the defendant, and for any negligence of his causing injury the defendant would be liable.

Mears left the cart and horse in the street unattended, and for this, if nothing more had taken place, the defendant would be liable, provided Mears's act caused the mischief, for it was negligence on his part. Mears had been cautioned not to leave the cart and horse unattended, and on a previous occasion had been corrected for so doing.

But there was a youth aged seventeen in the cart, who was also in the employ of the defendant. This youth, called Tucker, had nothing to do with the driving. Whilst Mears was away the reins, which had been placed on a hook intended to hold them when the driver was not using them, were taken from the hook by Tucker, and he proceeded to drive the cart some little way along the street for the purpose of turning it, and in so doing came into collision with the plaintiff's carriage, and caused the injury complained of.

The negligence of Mears was not disputed; but it was said that his negligence did not cause, but that the negligent driving of Tucker did cause, the mischief. Tucker had been prohibited from driving, and his driving was a direct act of disobedience on his part. In these circumstances the question is, Was it the negligence of Mears or of Tucker which caused the accident?

It was contended that nothing done in the way of driving by Tucker could make the defendant liable, because Tucker was not acting within the scope of his authority, had nothing to do with the driving, and in fact was acting in disobedience to the prohibition he had received. I think this is right. With regard to Mears, it was said he did not cause the mischief, and could not make the defendant liable, and that the mischief was caused by the intervention of another person—namely, Tucker, for which the defendant was not responsible.

After careful consideration I have come to the conclusion that Mears's negligence was the effective cause of the mischief, and that the defendant is liable.

Tindal C.J., in *Illidge* v. *Goodwin* (1), said: "If a man

(1) (1831) 5 C. & P. 190.

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chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." It was Mears's blameable carelessness which induced Tucker to do what he did. It was that carelessness which was the real moving and effective cause of the mischief, and I believe that is the inference which any jury would draw from the facts of this case.

If Tucker had not been in the cart, and Mears had left the cart unattended, and the horse had moved on, and injury had been caused to a passer-by, or if a passer-by had jumped into the cart and driven it, and injured some person by negligent driving, the defendant would have been liable.

Again, if Mears had asked a passer-by to stand at the head of the horse while he was absent, and the passer-by had left the horse, and the horse had gone on and injury had been caused to any person, the defendant would have been liable. Mears's carelessness in not anticipating what might not unreasonably happen would have been the real and effective cause of the mischief.

In this case Mears practically was leaving the horse and cart unattended. He knew Tucker was ordered not to interfere with the driving; he ought, therefore, to have anticipated that some casualty might happen, and it was his imprudence in this respect which caused the mischief. *Mann* v. *Ward* (1) is a very peculiar case, and is only reported in *The Times* Law Reports. I doubt if it is fully reported. It must be regarded as a decision on the very peculiar facts of that case, and, if correctly reported, the decision is one at which I could not myself have arrived. It is impossible to reconcile the various decisions with regard to negligence; and the reason is that fact and law are so mixed up in them that they are frequently decisions rather on the facts than on the law, and the variety of facts involved is infinite. I think this appeal should be dismissed.

RIGBY L.J. I am of the same opinion. It is not questioned here that if Mears's negligence is that to which the accident can be attributed the defendant is liable. It was argued, with some show of authority I agree, that wherever between the negligence

(1) 8 Times L. R. 699.

of a servant and the incident the act of some third person intervenes, and is the proximate cause of the accident, the employer is not liable. I do not consider that that is the state of the law upon the authorities. There are numerous cases. There is the case that Lopes L.J. referred to before Tindal C.J., and *Lynch* v. *Nurdin* (1), which was tried before Williams J.; whose decision, that it was a proper case to leave to a jury, was supported by the Court, the judgment being by Lord Denman C.J. There are many other cases; but I take it that the question is a question for a jury, and that we, sitting here and dealing with the finding of the county court judge as to matters of fact, ought to exercise the function of a jury. The county court judge has found that Mears was negligent. About that there can be no doubt at all, and he has found it as a fact. He has also found that Tucker was negligent, and that might be important if the point of law contended for on behalf of the plaintiff were really established law; but I do not think it is. I think it is right here to say that the county court judge was entitled to find upon the facts in favour of the plaintiff, that the Divisional Court was right in supporting that finding, and that we ought now to support it ourselves.

Appeal dismissed.

Solicitors for plaintiff: *Wood, Bigg & Co., for Kitsons & Co., Torquay.*

Solicitors for defendant: *Prior, Church & Adams, for T. C. Lindop, Torquay.*

(1) (1841) 1 Q. B. 29.

A. M.

1896
Dec. 11.

MANTLE, Appellant *v.* JORDAN, Respondent.

Local Government—County Council—By-law—Validity—Prohibition of Use of Profane or Obscene Language—By-law made "for good Rule and Government," and "for Prevention and Suppression of Nuisances"—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 16.

The respondent was charged under a by-law made by a county council under s. 16 of the Local Government Act, 1888, which was as follows: "No person shall, in any house, building, garden, land, or other place, abutting on, or near to, a street or public place, make use of any violent, abusive, profane, indecent, or obscene, language, gesture, or conduct, to the annoyance of any person in such street or public place."

The facts were sufficient to justify a conviction if the by-law was valid, but the justices declined to convict.

On a case stated:—

Held, that the by-law was made for "good rule and government," and "for prevention and suppression of nuisances," within the meaning of s. 23 of the Municipal Corporations Act, 1882, and therefore was valid under s. 16 of the Local Government Act, 1888, and the respondent ought to be convicted.

Case stated by justices.

An information was preferred by the appellant, an inspector in the Leicestershire police force, against the respondent, for that he, the respondent, did unlawfully use certain indecent and obscene language, in "his dwelling-house, abutting upon, and in, a certain public street, called Chapel Street, against the by-laws for the good rule and government of the county of Leicester."

The justices dismissed the information, but stated the following case for the opinion of the Court.

It was proved on the part of the appellant, and found as a fact, that the respondent did use certain indecent and obscene language in his dwelling-house, in a room abutting upon, and the door of which opened into, and was, at the time of the alleged offence, open to, a certain public street there, called Chapel Street, to the annoyance of a large number of persons then in that street.

A duly verified copy of the by-laws, "for the good rule and

government" of the county of Leicester, made on November 6, 1895, and approved by Her Majesty's Secretary of State, was produced and put in evidence.

No. 7 of such by-laws was as follows:—

"No person shall, in any house, building, garden, land, or other place, abutting on, or near to, a street or public place, make use of any violent, abusive, profane, indecent, or obscene, language, gesture, or conduct, to the annoyance of any person in such street or public place."

On behalf of the appellant it was contended that the Leicestershire County Council had full power, under s. 16 of the Local Government Act, 1888 (1), to make the by-law.

The respondent was not represented by counsel or solicitor. He called no witnesses, and practically did not dispute the facts, but stated in defence that he "was only having a few words with his wife, and committed no breach of any by-law in the public street."

The justices were of opinion that the facts proved would be ample to justify a conviction, if the by-law under which the information was laid was valid, yet, there being in their minds a doubt as to the validity of the by-law, they acquitted the respondent, subject to this case.

The question for the opinion of the Court was, whether the by-law for the breach of which the information was laid was ultra vires, unreasonable, and repugnant to law, and therefore invalid.

Toller, for the appellant. The justices have come to an erroneous conclusion in point of law, and the respondent ought

(1) By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 16, "A county council shall have the same power of making by-laws in relation to their county, or to any specified part or parts thereof, as the council of a borough have of making by-laws in relation to their borough under s. 23 of the Municipal Corporations Act, 1882."

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23, "The council may, from time to time, make such by-laws as to them seem meet for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough. . . . ."

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to be convicted. The by-law (No. 7), under which the information was laid, is a by-law "for good rule and government," within the meaning of s. 23 of the Municipal Corporations Act, 1882, and it is also a by-law "for prevention and suppression of nuisances." In either view therefore it is valid under s. 16 of the Local Government Act, 1888. The justices have misunderstood the decision in *Strickland* v. *Hayes* (1), for the by-law now before the Court contains the words "to the annoyance of any person in such street or public place," which are the very words the absence of which the Court relied on in that case. The respondent's conduct amounted to a nuisance, within the definition given in Hawkins's Pleas of the Crown (2): "It seems that a common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires." [He also referred to *Burnett* v. *Berry* (3); *Teale* v. *Harris*. (4)]

The respondent did not appear.

WILLS J. I am of opinion that in this case our judgment must be in favour of the appellant, on the ground that there is nothing repugnant to law in the by-law under which the justices declined to convict. The Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 16, combined with the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23, gives the county council power to make by-laws for the good rule and government of the county, and for prevention and suppression of nuisances. Under that provision I am of opinion that the county council under the power to make by-laws for the good rule and government of the county have jurisdiction to make a by-law for the purpose of stopping swearing, or the use of indecent or obscene language, under such circumstances as to be an annoyance to people lawfully passing along a highway. I am also of opinion that such conduct as the respondent in this case is found to have been guilty of, amounts to a nuisance. It is clear that

(1) [1896] 1 Q. B. 290.
(2) Book I., Part II., chap. xxxii., Division 4, s. 1, p. 532, edition of 1824.
(3) [1896] 1 Q. B. 641.
(4) (1896) 13 Times Rep. 15.

the by-law, under which the respondent was charged, is one which it is within the power of the county council to make. The case must therefore go back to the justices in order that they may convict.

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WRIGHT J. concurred.

Judgment for the appellant.

Solicitors for appellant: *Field, Roscoe & Co., for Freer, Leicester, Clerk to the Leicestershire County Council.*

P. B. H.

THE JOINT COMMITTEE OF THE RIVER RIBBLE *v.* THE CROSTON URBAN DISTRICT COUNCIL.

1896

Dec. 15, 17.

Estoppel—Matter of Record—Order to execute Sewage Works—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *s.* 3.

By s. 3 of the Rivers Pollution Prevention Act, 1876, it is made an offence to permit sewage to flow into a "stream" from a sewer constructed at the date of the passing of the Act without using the best practicable means to render the sewage harmless. And by s. 20 the term "stream" is defined to include only such tidal waters as may be determined by the Local Government Board by order. Jurisdiction is by the Act given to the county court to make an order restraining the further commission of the offence, and ordering the offenders to execute the necessary sewage works to render the sewage harmless, and to inflict penalties for disobedience to such order.

Proceedings having been taken in a county court under the Act against the defendants for permitting sewage to flow into a certain river, and neglecting to use the best practicable means to render the sewage harmless, the defendants consented to an order declaring them to have committed the alleged offence and ordering them to execute the necessary sewage works to prevent its continuance. At the date of that order the defendants were under the belief that the part of the river into which the sewage flowed was non-tidal. Subsequently the defendants, having been summoned for penalties for disobedience of the order, sought to shew that the part of the river into which the sewage flowed was tidal water, and that as there had been no order of the Local Government Board declaring it to be a stream they had committed no offence:—

Held, that the order of the county court was equivalent to a judgment,

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and that the defendants were estopped from disputing that they had committed the alleged offence, or from contending that the order of the Court in so far as it applied to the locus in quo was without jurisdiction.

APPEAL from the county court of Lancashire.

The plaintiffs are a joint committee constituted by a Provisional Order under s. 14 of the Local Government Act, 1888, "for the purpose of enforcing the provisions of the Rivers Pollution Prevention Act, 1876 (subject to the provisions in that Act contained), in relation to so much of the River Ribble, or any tributary thereof, and of the Rivers Darwen and Douglas, and the streams (as defined by the Act of 1876) running into the Crossens Channel, as passes through the county of Lancaster, or through or by the county boroughs of Blackburn, Burnley, Preston, and Wigan." The said order was duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 10) Act, 1891 (54 & 55 Vict. c. lxxi.). The defendants are the successors of the Local Board of Health for the District of Croston.

On August 12, 1892, the plaintiffs took proceedings in the county court under s. 10 of the Rivers Pollution Prevention Act, 1876, against the said Croston Local Board, claiming an order requiring the board to abstain from causing to fall into the Canalitch Brook and into the River Lostock and into the River Yarrow, they being streams within the board's district and within the jurisdiction of the plaintiffs, sewage matter, contrary to the provisions of s. 3 of the said Act, and also to abstain from allowing sewage matter to flow along certain channels constructed or in process of construction at the date of the passing of the said Act, and thence into the said streams, without using the best practicable and available means to render the sewage harmless, contrary to the provisions of the said section.

On February 22, 1893, at the hearing of the action, an order was made by consent whereby it was adjudged that the plaintiffs "are entitled to an order against the defendants under ss. 3 and 10 of the Rivers Pollution Prevention Act, 1876, (1) and

(1) By s. 3 of the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), "Every person who causes . . . . or knowingly permits to

this Court doth declare that the defendants have committed an offence against the said Act by permitting to fall or flow or be carried through channels under their control into the River Yarrow and thence into the River Douglas and into the River Ribble solid and liquid sewage matter contrary to the provisions of Part II., s. 3, of the said Act, and this Court doth further declare that the defendants have made default in their duty in that behalf by not using the best practicable and available means to render harmless the sewage matter which they permit to fall or flow or be carried as aforesaid into the said River Yarrow into the said River Douglas and into the said River Ribble contrary to the provisions of the said part of the said Act, and this Court doth hereby order the defendants to abstain from the commission of the said offence and doth further order the defendants to perform their duty in the premises in the manner following, that is to say—the defendants shall make and construct such works and adopt such means as may be necessary to prevent the further pollution of the River Yarrow and River Douglas. And this Court doth further order the defendants forthwith to commence the said works and to proceed with the said works until the same are

fall . . . . into any stream any solid or liquid sewage matter" shall be guilty of an offence against the Act. "Where any sewage matter falls or flows . . . . into any stream along a channel used constructed or in process of construction at the date of the passing of this Act for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow . . . . shall not be deemed to have committed an offence against this Act if he shews . . . . that he is using the best practicable and available means to render harmless the sewage matter."

Sect. 10: "The county court having jurisdiction in the place where any offence against this Act is committed may by summary order require any person to abstain from the commission of such offence, and where such offence consists in default to perform a duty under this Act may require him to perform such duty in manner in the said order specified."

"Any person making default in complying with any requirement of an order of a county court made in pursuance of this section shall pay . . . . such sum not exceeding 50*l.* a day for every day during which he is in default as the Court may order."

Sect. 20: "'Stream' includes the sea to such extent, and tidal waters to such point, as may, after local inquiry and on sanitary grounds, be determined by the Local Government Board, by order published in the *London Gazette*."

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completed and to complete the same within eighteen calendar months from the date of this order." At the time of consenting to such order the local board were unaware that the said rivers at the places where the sewage was allowed to fall into them were tidal, and that consequently, as no order had been made by the Local Government Board declaring them to be "streams" under s. 20 of the Rivers Pollution Prevention Act, 1876, it was not an offence under s. 3 of that Act to permit sewage to fall into them.

On March 2, 1895, the plaintiffs entered a plaint in the county court against the said local board, complaining that the board had for 191 days, to wit from August 22, 1894, made default in complying with the requirements of the above-mentioned order, and claiming 50*l.* per day for the said 191 days.

At the hearing of the said plaint it was admitted by the local board that they had not abstained from permitting their sewage to fall into the said rivers, but they contended that at the point at which the sewage entered the rivers the water was tidal, and that, as the Court had no jurisdiction to prohibit the discharge of sewage at such a point, the order of the Court must be read as prohibiting the discharge of sewage into non-tidal portions of the rivers only. The judge, however, held that the defendants were estopped from disputing that the order, which was in general terms, applied to all the sewage which came from their district into the said rivers, on the ground that by consenting to the order they induced the plaintiffs to refrain from applying to the Local Government Board for an order declaring the parts of the said rivers into which the sewage was discharged to be streams within the meaning of the Act. He found that the defendants were in default, and fined them in penalties amounting to 114*l.* The defendants, who had in the meantime, under the provisions of the Local Government Act, 1894, become the Croston Urban District Council, appealed.

Macmorran, Q.C., and *Firth*, for the defendants. It is admitted that the order was good as to non-tidal portions of the river, but it is contended that it was without jurisdiction

and bad if it is to be read as applying to tidal water. The defendants were prepared to shew that they did not pollute any of the non-tidal part. The judge was wrong in holding that the defendants were estopped by their conduct in consenting to the order. To create an estoppel in pais there must be a representation upon which the other party is intended to act. There was nothing of the kind here. Nor was there any negligence on the part of the defendants in omitting to ascertain the facts before giving the consent. It was a pure mistake common to both parties.

E. Sutton and *F. H. Mellor*, for the plaintiffs. By reason of the defendants' consent to the order the plaintiffs altered their position. Had the point as to the water being tidal been taken and established at the hearing, the plaintiffs would at once have applied to the Local Government Board for an order declaring this part of the river to be a stream. The defendants' conduct induced them to abstain from taking that course. That amounts to an estoppel in pais. But even if it does not, the order is equivalent to a judgment and operates as an estoppel by record. And the fact that it was by consent makes no difference, for a judgment by consent is as effective as an estoppel between the parties as is a judgment in a contested case: *In re South American and Mexican Co.* (1)

Macmorran, Q.C., in reply.

WILLS J. The facts in this case are that in 1892 the joint committee of the River Ribble made a complaint against the Croston Local Board (the defendants' predecessors) for pouring sewage matter into certain streams which were within the jurisdiction of the complainants, and the local board submitted to an order, drawn up by consent, which declared that the board had committed an offence against the Rivers Pollution Prevention Act, 1876, "by permitting to flow through channels under their control into the River Yarrow and thence into the River Douglas and into the River Ribble solid and liquid sewage matter contrary to the provisions of Part II., s. 3, of the said Act," and that they had failed in their duty "by not using the

(1) [1895] 1 Ch. 37.

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best practicable and available means to render harmless the sewage matter which they permitted to flow into the said River Yarrow and into the said River Douglas and into the said River Ribble contrary to the provisions of the said Act." And the order proceeded to direct the board to abstain from the further commission of the said offence, and ordered them to construct for that purpose such sewage works as might be necessary. Then the present action was brought to recover penalties for breach of that order. In answer to that action the defendants desire to shew that, although they by consenting to the order admitted that it was an offence to discharge their sewage into the said rivers, and therefore admitted that the parts of those rivers into which the sewage poured were non-tidal waters, such parts of the said rivers were in fact tidal waters, and that therefore any order with respect to those parts was beyond the jurisdiction of the Court. I am of opinion that such a contention cannot be set up in answer to the action. The order is perfectly good on the face of it, and it would be contrary to all principle to allow the defendants now to urge reasons for not obeying it which might have been set up at the time when the order was consented to. If the order is capable of being set right, an action for that purpose is the proper remedy. It certainly is not proper to refuse to obey the order while it stands. This appeal must fail.

WRIGHT J. I am of the same opinion. The order can only be appealed from now, if at all, by leave being obtained to withdraw the consent on the ground of mistake.

Appeal dismissed.

Solicitors for defendants: *W. & R. Ascroft, Preston.*
Solicitor for plaintiffs: *W. H. Wilson, Preston.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1897
Jan. 11.

PALLISER *v.* DALE AND OTHERS.

Friendly Society—Jurisdiction—Dispute as to Title to be Member—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 22—*Friendly Societies Act*, 1895 (58 & 59 *Vict. c.* 26), *s.* 10, *sub-s.* 1.

The Friendly Societies Act, 1895, s. 10, sub-s. 1, merely extended the period during which s. 22 of the Friendly Societies Act, 1875, was applicable to disputes within it, and did not extend the provisions of that section to a class of disputes not previously within it, namely, disputes as to the title of a person to be a member of the society. The jurisdiction of the Court was therefore not ousted with regard to such disputes by those enactments.

Prentice v. *London*, (1875) L. R. 10 C. P. 679, and *Willis* v. *Wells*, [1892] 2 Q. B. 225, followed.

APPEAL from the refusal of a judge at chambers to grant an injunction.

The defendants were the trustees of the Providential Sick Society of Northallerton, a friendly society registered under the Friendly Societies Acts, of which the plaintiff had been a member since 1839.

At a meeting of the management committee of the society held on May 1, 1896, it was resolved that the plaintiff should make an apology for having falsely stated that he had not received a funeral donation due to him under the rules of the society on the death of his wife, and in the event of his failing to apologize on or before May 9 a fine of twenty-one shillings should be inflicted on him. The plaintiff, who denied having made such a statement as alleged, did not apologize or pay the fine so inflicted. On August 17 the plaintiff received a notice from the secretary of the society to the effect that he was in arrear by the amount of the fine which remained due on the last meeting night, August 1, 1896, and that, if it were not paid during the usual hours of business and before the books were closed, the plaintiff would subject himself to suspension from all benefits and privileges of the society as per rule 5.

By the rules of the society it was provided as follows:

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Rule 5. All members shall make themselves good on the books at the last meeting night in December in each year, or be fined sixpence per month for neglecting to do so; and any member allowing his contributions, levies, or fines to exceed twelve weeks shall have a notice sent him by the secretary stating how much he is in arrears, and, if he does not bring himself into compliance on the following meeting of the society, he shall cease to have any claim upon the society. Rule 25. Any member of the society breaking a rule thereof, or committing any offence to which no specific fine is attached, shall be fined not less than 2*s.* 6*d.* and not exceeding the sum of 1*l.* 1*s.*, as the majority of the management committee shall think fit. Rule 27. If any dispute shall arise between a member, or person claiming through a member or under the rules of the society, and the society, or any officer thereof, it shall be referred to a summoned meeting of the society, to which every member good on the books, residing within three miles of the society's registered office, shall be summoned, when seven clear days' notice shall be given previous to holding such meeting, and the decision of the majority of members there present shall be final and conclusive.

The plaintiff on August 29 tendered a contribution then due from him to the society under the rules, but the officers of the society refused to receive it. The society continuing to refuse to receive contributions from the plaintiff, on November 3, 1896, he brought an action against the defendants, claiming an injunction to restrain them and the society from excluding him from the meetings and benefits of the society, and from refusing to receive his subscriptions. Application was made to a judge at chambers for an interim injunction as above until the trial; but he refused the application on the ground that by reason of the provisions of s. 10 of the Friendly Societies Act, 1895, the dispute must be determined in the manner directed by the rules of the society for the determination of disputes, and therefore he had no jurisdiction. (1)

(1) The Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 22, provides that "every dispute between a member or person claiming through a member or under the rules of a registered society, and the society, or

Scott Fox, for the plaintiff. The learned judge was wrong in holding that he had no jurisdiction. It was held in *Willis* v. *Wells* (1), following the decision in *Prentice* v. *London* (2), which was itself based on the earlier decision in *Morrison* v. *Glover* (3), that, where the dispute was as to the title of the person aggrieved to be a member of the society, it was not such a dispute as came within s. 22 of the Friendly Societies Act, 1875. Those cases govern the present, unless the provisions of sub-s. 1 of s. 10 of the Friendly Societies Act, 1895, altered the law in that respect. It is contended that they did not. The object of that sub-section was merely to extend the application of s. 22 of the Act of 1875 to a period of six months after the member who has a dispute with the society within that section has ceased to be a member. It was not intended by that provision to extend the effect of s. 22 to a class of disputes which was not previously within it, or to interfere with the law as laid down in the decisions referred to.

The committee had no power under the rules to impose the fine which they imposed on the plaintiff, or to expel him for non-payment of it. The injunction should therefore issue.

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an officer thereof, shall be decided in manner directed by the rules of the society, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removeable into any court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court." Then follow certain provisoes which it is unnecessary for the purposes of this report to set out.

The Friendly Societies Act, 1895 (58 & 59 Vict. c. 26), s. 10, sub-s. 1, provides that "section twenty-two of the principal Act, which relates to the settlement of disputes, shall apply to every dispute between any person aggrieved who has for not more than six months ceased to be a member of a registered society, or any person claiming through such person aggrieved, and the society, or an officer thereof, and accordingly in that section after the words 'registered society,' where they first occur, shall be added the words 'or any person aggrieved who has for not more than six months ceased to be a member of a registered society, or any person claiming through such person aggrieved.'"

The above provisions were repealed by s. 107 of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), which consolidates the law relating to friendly societies, but appear to be substantially re-enacted by s. 68 of that Act.

(1) [1892] 2 Q. B. 225.

(2) L. R. 10 C. P. 679.

(3) (1849) 4 Ex. 430.

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Practically, this is the trial of the action, as all the facts are before the Court.

H. Manisty, for the defendants. The questions which arise are, first, whether the plaintiff is a person to whom the provisions of rule 27, and s. 22 of the Act of 1875 apply; and secondly, whether the dispute is of such a nature as to come within the rule. It is submitted that sub-s. 1 of s. 10 of the Friendly Societies Act, 1895, was clearly enacted for the purpose of extending the provisions of s. 22 of the Act of 1875, so as to bring such a dispute as this within that section and the provisions of the society's rules with regard to the settlement of disputes. The plaintiff comes exactly within the terms of the sub-section, he being a person aggrieved who had ceased within six months to be a member of the society. The dispute was such a dispute as was contemplated by rule 27, being a dispute as to the construction of the rules and their effect upon the position of the plaintiff as a member under the circumstances. The question was as to the power of the committee under the rules to fine the plaintiff and the effect of non-payment of the fine. The argument in *Willis* v. *Wells* (1) was that the society could not claim the benefit of s. 22 of the Act of 1875, which only applied to disputes between a member and the society, when they were alleging that the plaintiff was not a member. That difficulty is got rid of by s. 10 of the Act of 1895.

It is contended that the committee had power to fine the plaintiff under rule 25, as having committed an "offence" against the society. The statement which he made was calculated to damage the reputation of the society. The plaintiff having neglected to pay the fine for more than twelve weeks, and not having brought himself into compliance under rule 5, ceased to have any claim on the society.

[In answer to the Court he admitted that the facts were all before the Court and could not be altered by any further evidence on the part of the defendants, and therefore nothing would be gained by sending the case back to the learned judge.]

Scott Fox was not called on to reply.

(1) [1892] 2 Q. B. 225.

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LORD ESHER M.R. In this case a dispute arose between the plaintiff and a friendly society, of which he had for a long period been a member, under the following circumstances. The committee of management, assuming to act under rule 25 of the society's rules, fined the plaintiff 1*l.* 1*s.*, and, the plaintiff refusing to pay that fine, they in effect expelled him from the society, that is to say, they declined to treat him any longer as a member. He thereupon brought an action, claiming an injunction to restrain the society from excluding him. Previously to the passing of the Friendly Societies Act, 1895, it had been held in *Willis* v. *Wells* (1), following *Prentice* v. *London* (2), that, where a dispute arose between a person who had been a member of a friendly society and the society as to whether they had a right to expel him from the society, which they had assumed to do, the case was not one in which the jurisdiction of the courts was ousted, and which must be determined in the manner directed by the rules of the society. For the reasons given in that and the previous case, I am of opinion that they were rightly decided, and that it was correct to say that a dispute as to whether a person is a member of the society or not is not a dispute between the society and a member of it as such, which must be determined in accordance with the rules of the society. The effect of those decisions really comes to this: that, if the society choose to expel a member, they are estopped from afterwards saying that he is a member, and therefore bound by the provision of the rules with regard to disputes between the society and a member of it. That being the state of the law on the subject prior to 1895, was there anything in s. 10 of the Friendly Societies Act, 1895, which altered it? It appears to me that the "dispute" contemplated by that section must be a dispute of the kind which would come within s. 22 of the Act of 1875; and that the only effect of s. 10, sub-s. 1, is that such a dispute as would have come within s. 22, and therefore must have been determined in accordance with the rules of the society, while the person aggrieved was still a member of the society, is to be determined in the same way for a period of six months after he has ceased

(1) [1892] 2 Q. B. 225. (2) L. R. 10 C. P. 679.

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to be a member. I do not think the Legislature intended by this enactment to alter the nature of the disputes to which s. 22 of the Act of 1875 was applicable. It having been decided that a dispute similar to that which arose in the present case was not within the provisions of s. 22, I do not think the addition to the words of that section contained in s. 10, sub-1, of the Act of 1895 brought such a dispute within it. The result is that the decisions prior to the Act of 1895 are applicable, and the plaintiff is not deprived of his remedy by action in the High Court.

The learned judge, therefore, had jurisdiction, and was bound to entertain the application and decide the question that arose thereon. The question in dispute between the parties in the action was in substance whether the society had a right to expel the plaintiff. The contention for the society is in effect that they had a right to impose the fine which they imposed upon the plaintiff, and to expel him for non-payment of that fine. It does not appear to me necessarily to follow that, if they had a right to fine him, they had a right to expel him because he did not pay the fine; but, assuming that they would have such a right of expulsion, what right had they to fine him? The rule vouched as giving them that right is rule 25. That rule provides for the infliction of a fine upon any member breaking a rule of the society, or committing any offence to which no specific fine is attached. I do not see how anything can be an offence within the meaning of that rule which is not a breach of any provision either express or implied of the rules of the society. There is no provision in the rules by which it is made an offence against the rules to say that the society has not made some payment to a member which they ought to have made. It appears to me that the society had no jurisdiction to impose the fine which they imposed on the plaintiff, and no right to expel him from the society for non-payment of it. The facts of the case being all before us, and being incapable of alteration, the defendants' counsel very properly agreed to take the judgment of this Court upon them as being the judgment which the judge ought to have given upon the facts. The appeal must therefore be

allowed, and an injunction must issue as applied for by the plaintiff.

LOPES L.J. The first question is whether or not the judge at chambers had jurisdiction to grant an injunction. I am clearly of opinion that he had. The object of s. 22 of the Friendly Societies Act, 1875, was, I think, as stated by Lindley J. in *Prentice* v. *London* (1), to provide for the easy settlement of internal disputes between the officers of the society and its members. That assumes the parties both to be members of the society. If the matter in controversy is whether the party is a member or not, that clearly is not a matter of internal arrangement, and therefore I think such a dispute is not one within the provisions of the section. There appears to be plenty of authority for this view. In *Prentice* v. *London* (1) it was held that, where the trustees of a friendly society denied the right of the plaintiff to be a member of the society, they were estopped from saying that the dispute was one within a rule which provided for the determination of disputes between the society and a member. In 1892 the same question again came before the High Court in *Willis* v. *Wells* (2), and it was again held that s. 22 of the Act of 1875 and the rules applied only to disputes arising between members and the society, and did not include a dispute as to whether a person who had been expelled from the society was entitled to be reinstated. Upon the strength of these authorities, it appears to me clear that prior to the Act of 1895 in a case like the present the Court would have had jurisdiction to grant an injunction.

But then it is argued that the law in that respect was altered by s. 10 of the Friendly Societies Act, 1895. It is contended that the effect of that section is that, even in the case of a member who has been expelled, the period of membership is extended for six months for this purpose, so as to bring the dispute within the provisions of s. 22 and the rules of the society with regard to the determination of disputes. I cannot adopt that view. I cannot think that it was the object of the Legislature to make that a "dispute"

(1) L. R. 10 C. P. 679. (2) [1892] 2 Q. B. 225.

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within s. 22 and the rules which was not such a dispute before, and so to oust the jurisdiction of the courts of law over it. I do not think that the words "ceased to be a member" in the section were intended to apply to a case of expulsion, or to do away with the estoppel which had been previously held to exist in such a case. It is to be observed that, if the contention for the defendants as to the construction of the section is correct, the only effect is that this action was brought a little too soon. In my opinion it was not intended by this enactment to make that a dispute within s. 22 which would not have been so before, or to interfere with the principle of law laid down in *Prentice* v. *London* (1) and *Willis* v. *Wells*. (2) I therefore think that the learned judge had jurisdiction.

The second question is whether, there being jurisdiction, the injunction ought to be granted. It might, under other circumstances, have been necessary to send the case back to the learned judge; but the defendants' counsel has obviated any necessity for that. That being so, I think that the injunction ought to be granted. I cannot see that the plaintiff was guilty of any offence such as is contemplated by rule 25 of the society's rules. He denies that he made the statement which he is charged with making; but, even if he did make it, I do not think he committed any offence within the rules. The defendants had in my opinion no power to fine the plaintiff as they did, or to expel him from the society for non-payment of that fine. For these reasons the appeal must be allowed and the injunction must issue.

Appeal allowed.

Solicitors for plaintiff: *Williamson, Hill & Co., for Fowle & Horsfall, Northallerton.*

Solicitors for defendants: *Field, Roscoe & Co., for J. W. Teale, York.*

(1) L. R. 10 C. P. 679.

(2) [1892] 2 Q. B. 225.

E. L.

VALLANCEY *v.* FLETCHER.

1897
Jan. 18.

*Brawling—Liability of Clergyman for—*23 & 24 *Vict. c.* 32, *s.* 2.

Sect. 2 of 23 & 24 Vict. c. 32, which provides that "any person" who shall be guilty of riotous, violent, or indecent behaviour in any churches, chapels, or churchyards shall be liable to a penalty, applies as well to persons in Holy Orders as to laymen.

Case stated by justices of Derbyshire.

The appellant, who is the perpetual curate of the parish of Rosliston, was summoned before the justices under s. 2 of 23 & 24 Vict. c. 32 (1), for having been guilty of violent and indecent behaviour in the churchyard of his own parish church. The justices found as a fact that his conduct had been both violent and indecent. But it was contended on behalf of the appellant that the section does not apply to persons in Holy Orders. The justices overruled the contention and convicted the appellant, subject to a case for the opinion of the Court.

Simpson, for the appellant. The justices had no jurisdiction. The only remedy against a clergyman for brawling is in the Ecclesiastical Court. Prior to 23 & 24 Vict. c. 32, laymen as well as clergymen were subject to the jurisdiction of the Ecclesiastical Courts in respect of brawling; and the object of that Act was to transfer the jurisdiction to punish laymen for brawling from the ecclesiastical to the temporal courts. The preamble recites as the object of the Act nothing more than that it is expedient to abolish the jurisdiction of the Ecclesiastical Courts of England and Ireland over persons not in Holy Orders in suits for brawling. The words "any person" in s. 2, mean any person not in Holy Orders.

Appleton and *Borough*, for the respondent, were not called on.

(1) By s. 2 of 23 & 24 Vict. c. 32, "Any person who shall be guilty of riotous violent or indecent behaviour . . . . in any cathedral church, parish or district church or chapel of the Church of England and Ireland, or in any chapel of any religious denomination, ... or in any churchyard or burial ground," shall on conviction before two justices be liable to a penalty.

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WRIGHT J. The only question of law in this case is whether the section applies to persons in Holy Orders. I am of opinion that it does. The words of the section are perfectly general. No doubt the primary object of the Act was to release laymen from the jurisdiction of the Ecclesiastical Courts, and that object is carried out by s. 1. But I see no reason for cutting down the generality of the language of s. 2.

BRUCE J. I am of the same opinion. I cannot entertain any doubt that the word "person" in s. 2 applies to all persons of every kind.

Appeal dismissed.

Solicitors for appellant: *S. W. Johnson & Son.*

Solicitors for respondent: *Warren, Morton & Miller, for Ranson & Hutton, Nottingham.*

J. F. C.

1897
Jan. 22.

[IN THE COURT OF APPEAL.]

In re WARD.
Ex parte WARD.

Bankruptcy—Appropriation of Bankrupt's Pay or Salary—Retired Officer—Pension—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 53, *sub-ss.* 1, 2.

An officer who has been permitted to retire from the army, and is in receipt of "retired pay" under art. 1057 of the Royal Warrant of 1887, though still an officer in the reserve, comes within sub-s. 2, and not sub-s. 1, of s. 53 of the Bankruptcy Act, 1883; and therefore upon his bankruptcy an order may be made appropriating a portion of his retired pay for the benefit of creditors under that section without the consent required by sub-s. 1.

APPEAL by a bankrupt from an order made by a registrar in bankruptcy as after mentioned under the Bankruptcy Act, 1883, s. 53.

The bankrupt had been formerly lieutenant-colonel of the 2nd Battalion Scottish Rifles. On April 4, 1888, he elected to retire from the army under art. 77 of the Royal Warrant

(Pay and Promotion) of 1887, and was placed on the retired or non-effective list of officers on retired pay of 420*l.* per annum.

The Royal Warrant of 1887 contained the following provisions:—

By art. 77 it was provided that "A lieutenant-colonel shall, if not previously liable to retirement on account of age, be placed upon half-pay, unless he elect to retire from our army, on completing four years' service in command of a regiment of cavalry or a battalion of infantry." Art. 103 provided that "A retired officer, whether he shall have commuted his retired pay or not, shall remain liable to be recalled to service in our regular forces or in our auxiliary forces at a time of emergency, until the age of . . . . 55, if he retire as major, lieutenant-colonel or colonel." By art. 519, "The reserve of officers shall be composed of (*a*) officers who have served in our regular forces, but who, having retired either with retired pay or gratuity, are still liable for service in case of emergency." By art. 520, "An officer retired from our army on a pension or gratuity with the condition of being liable for service in a case of emergency shall be an army reserve officer, so long as he is liable for service." By art. 1050, half-pay is limited to officers on the effective list. By art. 1057, "An officer permitted to retire from our army shall receive upon retirement a gratuity or retired pay according to the following scale . . . . after four years' employment as substantive lieutenant-colonel or colonel in our cavalry or infantry 420*l.* yearly." The bankrupt had not attained the age of fifty-five. It appeared that he had no means other than his retired pay, was not in good health, and had a wife and child to support.

An order had been made for summary administration of the bankrupt's affairs, and the official receiver was the trustee in the bankruptcy. The only liability was a judgment debt of 259*l.* 3*s.* 2*d.* Upon the application of the official receiver the registrar made an order for the payment to the official receiver of 40*l.* per annum out of the bankrupt's retired pay under s. 53 of the Bankruptcy Act, 1883, reserving liberty to the bankrupt to apply when the amount of 10*s.* in the pound upon the debt

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had been paid. No consent to the making of the order had been given by the chief officer of the department under which the bankrupt's retired pay was enjoyed. (1)

H. Reed, Q.C., and *E. P. Willes*, for the bankrupt. The bankrupt, being still an officer in the reserve, and liable for service in case of emergency, is in receipt of pay within the meaning of sub-s. 1 of s. 53, and, the consent of the chief officer of the department not having been obtained, the order is void. Sub-s. 2 is inapplicable. The allowance which the bankrupt receives is not half-pay, because the bankrupt is on the non-effective list. Nor is it a pension, i.e., a sum payable in respect of past services, because he is still in the service as an officer in the reserve, and it is therefore pay which he receives in respect of liability to serve in the future if required on an emergency. Nor is it compensation granted by the Treasury, because it is granted by the Secretary of State for War under the Royal Warrant. Further, it is submitted that an allowance such as the bankrupt enjoys comes within the principle laid down in *Ex parte Webber* (2), inasmuch as it is a mere voluntary allowance granted by the Crown for the maintenance of a retired officer.

[LORD ESHER M.R. The decision in *Ex parte Webber* (2) has no bearing on the present case. It turned on the peculiar

(1) Bankruptcy Act, 1883, s. 53: "(1.) Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the trustee shall receive for distribution amongst the creditors so much of the bankrupt's pay or salary as the Court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct. Before making any order under this sub-section the Court shall communicate with the chief officer of the department as to the amount, time, and manner of the payment to the trustee, and shall obtain the written consent of the chief officer to the terms of such payment. (2.) Where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee to be applied by him in such manner as the Court may direct."

(2) (1886) 18 Q. B. D. 111.

nature of the allowance there made by the Secretary of State for India.]

The case of *In re Saunders* (1) is strong to shew that in such a case as this, where the bankrupt has no other means than his retired pay, as a matter of discretion, an order ought not to be made. The object of making such an allowance is that a retired servant of the Crown may be able to live in a manner befitting the position which he has filled, and the scale of allowances is presumably calculated accordingly. Therefore, as a matter of principle, the Court ought not, in the exercise of its discretion, when the officer has no other means, to make any deduction from the allowance. In any case the amount here ordered to be paid was too large, having regard to the circumstances of the case.

[They cited *In re Shine*. (2)]

The Attorney-General (*Sir R. E. Webster, Q.C.*), and *Muir Mackenzie*, for the official receiver. The contention that the order cannot be made because this is a mere voluntary allowance by the Crown cannot be sound, because, if it were, all payments by the Crown to its servants being voluntary, s. 53 could have no application at all. Sub-s. 1 applies only to officers and servants of the Crown on active service. The reason for requiring in the case of such an officer the consent of the chief of the department obviously is that he may consider whether the setting aside of a portion of the officer's pay is consistent with the public interest and his official position. There is no such reason in the case of a retired officer on the non-effective list. The case is within sub-s. 2. The retired pay which the bankrupt is receiving is a form of "pension." There being jurisdiction to make an order, the question whether it shall be made, and if so for what amount, is entirely one of discretion to be exercised according to the circumstances of the case: *In re Saunders*. (1) It is contended that under the circumstances the registrar exercised his discretion rightly.

[They referred to *Ex parte Huggins*. (3)]

E. P. Willes, in reply.

(1) [1895] 2 Q. B. 424. (2) [1892] 1 Q. B. 522.
(3) (1882) 21 Ch. D. 85.

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LORD ESHER M.R. The first question in this case depends on the construction to be put on sub-ss. 1 and 2 of s. 53 of the Bankruptcy Act, 1883, as applied to the case of an officer in the position of the bankrupt. Comparing the language of the two sub-sections together, it appears to me that the 1st sub-section relates to pay or salary which an officer of the army or navy or a civil servant of the Crown is receiving in respect of services he is then rendering, and not to pay which he is receiving in respect of past services. The 2nd sub-section provides for the case "where a bankrupt is in the receipt of a salary or income other than as aforesaid"—that is to say, other than pay or salary which such an officer or servant of the Crown is receiving in respect of services then being rendered—"or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury." What is the nature of the payment which the bankrupt in this case is receiving? He is an officer who has been permitted to retire from the army within the meaning of the Royal Warrant of 1887. That does not mean to retire altogether, because for certain purposes he continues to belong to the army, but to retire in the sense contemplated by the warrant. Upon so retiring, he became entitled under art. 1057 of the Royal Warrant to a gratuity or retired pay of a certain amount. That gratuity or retired pay does not appear to me to be given to him on account of any services which he is rendering, because, upon retiring in the sense contemplated by the article, he ceases to perform any services. It is true that he may again be called upon to serve, if placed on the active list again, in the event of an emergency; but what he receives by way of retired pay is, in my opinion, received, not in respect of any services which he is rendering, but in respect of services which he has rendered in the past. That being so, where art. 1057 applies, I think the case falls within the 2nd and not the 1st sub-section of s. 53. Therefore the objection taken to the validity of the order, on the ground that the consent of the chief officer of the department was not obtained, falls to the ground, and there was jurisdiction to make the order. The remaining question, which is more difficult, is as to the mode in which the discretion given by s. 53 ought in this case to be

exercised. That is not a matter of law, but of discretion to be exercised by the Court in each case, having regard to its knowledge of life and the particular circumstances of the case. The learned registrar seems to have looked to other cases as authorities with regard to the amount to be set aside out of the bankrupt's pay; but I do not think that any rule can be correctly laid down on such a matter. In this case we must take into account the bankrupt's former position in the army, the fact that he is in bad health and may require medical assistance, and the fact that he has no means except his retired pay, having a wife and child to support: and also that he ought to be allowed enough to enable him to live in such a manner as without extravagance may befit a retired officer in his position. Having regard to all these matters, I think that to reduce this allowance which is his only income by the sum of 40*l.* yearly would hardly leave him a sufficient income to enable him to live in such a manner as he ought to live. Under all the circumstances I think that the justice of the case will be met by reducing the sum of 40*l.* ordered by the registrar to be set aside out of the bankrupt's retired pay to 20*l.*, and leaving his order in other respects to stand.

LOPES L.J. The main question is whether this case falls within sub-s. 1 or sub-s. 2 of s. 53 of the Bankruptcy Act, 1883. The bankrupt is an officer who comes within the terms of art. 1057 of the Royal Warrant, that is to say, he is an officer who has been allowed to retire, but he is liable to be recalled to the service upon an emergency. It appears to me that sub-s. 1 of s. 53 of the Bankruptcy Act, 1883, refers to pay or salary of an officer who is receiving full pay or salary for services then being rendered. In that case it is very intelligible why the consent of the chief officer of the department should be required to an order under the sub-section. It may be that an officer is employed in some command or other duty for the purposes of which it is necessary that he should maintain a certain position, and that it would be for that reason most undesirable in the public interest that there should be a reduction of his income. If the bankrupt came within that sub-section, the order made

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would be invalid, because no such consent as is required by the sub-section has been obtained. But, as I have already said, I think that sub-section applies only to an officer on active service who is receiving full pay or salary in respect of services then being rendered. When we come to sub-s. 2, the language is different. It applies to a case "where a bankrupt is in the receipt of a salary or income other than as aforesaid," that is, other than that contemplated by the 1st sub-section, "or is entitled to any half-pay or pension, or to any compensation granted by the Treasury." The present case comes, in my opinion, within that sub-section, and, therefore, there is jurisdiction to make the order. Then with regard to the amount for which it should be made, that is a matter for the discretion of the Court. Having regard to the circumstances of this case, I agree with the conclusion arrived at by the Master of the Rolls, namely, that the amount ordered to be set aside by the registrar should be reduced to 20*l.*

CHITTY L.J. I also think that there was jurisdiction to make the order, and that the case comes within sub-s. 2 of s. 53 of the Bankruptcy Act, 1883. The counsel for the bankrupt attempted to argue that the order could not be supported either under sub-s. 1 or under sub-s. 2. I agree that the case does not come within sub-s. 1; for I think that that sub-section applies to officers in active employment, and that appears to me to be the reason why, under that sub-section, the consent of the chief officer of the department is required before an order can be made. In the case of an officer on active service, the object of requiring this consent probably was that the chief officer of the department might consider whether a sufficient income would be left to maintain the officer in such a condition of life as might be essential to his position while on service. It appears to me that the case comes within the words "where a bankrupt . . . . is entitled to any half-pay or pension" in sub-s. 2. The bankrupt has retired from active service, and the allowance which he is enjoying is in substance a pension for past services, and none the less so, in my opinion, because

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it may also be to some extent in the nature of a retaining fee with regard to a future emergency.

Then, as to the amount for which the order should be made, it is unnecessary for me to discuss again the circumstances of the case. I agree with the conclusion arrived at by the other members of the Court. It is purely a matter for the discretion of the Court to be exercised with regard to the circumstances of the particular case, and I cannot derive any assistance from decisions which have been arrived at in other cases where the circumstances were different.

Order varied accordingly.

Solicitor for bankrupt: *W. F. Tonkin.*
Solicitor for official receiver: *Solicitor to Board of Trade.*

E. L.

COWEN *v.* TOWN CLERK OF KINGSTON-UPON-HULL.

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Nov. 14;
Dec. 21.

Parliament—Franchise—Borough Vote—Alms which by the Law of Parliament disqualify from Voting—Reform Act, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 36.

For more than a year previous to July 15, 1896, the appellant was a brother of a hospital at Hull and occupied a room therein, in respect of which he was rated for the relief of the poor, and was in receipt of a weekly allowance of 7*s.* with medical attendance and coals.

The hospital was founded in 1384 for feeble or old men and women "so long as they are necessitous." The property from which the revenues were derived was granted to the master, brethren, and sisters and their successors for ever, and is still vested in them. By subsequent schemes the brethren and sisters were elected by the corporation of Hull and were removable at their pleasure. This power of removal had, however, never been exercised. The brethren had hitherto voted without objection in parliamentary elections:—

Held, that the appellant was not disqualified from voting by the receipt of alms within the meaning of s. 36 of the Reform Act, 1832.

CASE stated by the revising barrister for the borough of Kingston-upon-Hull, who had removed the name of the appellant from the occupiers' list of voters for the central division of the borough upon the ground that he was disqualified under

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s. 36 of the Reform Act, 1832, by the receipt of alms during the past year.

The following statement of facts is taken from the judgment of Hawkins J. :—

The appellant is and for some years has been a brother of a charity known as the "Charter House," or "God's House" Hospital in the said borough, and as such brother he has during all that time occupied a room in the said house or hospital, in respect of which he has been duly rated in the rates for the relief of the poor; such rates, however, have been paid out of the funds of the charity. He has also been in receipt of a weekly allowance of 7*s.* with medical attendance and coals.

The charity was founded by Letters Patent in 1384 in the reign of Richard II. by Sir Michael de la Pole, in two messuages called Maisondieu, "for thirteen poor men and thirteen poor women, feeble or old, to be called 'God's House of Hull,' so long as they are necessitous." Over them was appointed a master and warden, under obedience to whom the rest of the poor people as well as brothers and sisters should continue in perpetuity; and the said master was required to pay to each one of the said poor people 40*s.* annually for all their necessities, as well food as clothing, namely, to every one of them 8*d.* per week. By the said Letters Patent the said founder, with the King's licence and consent, gave, granted and confirmed unto the master, brethren, and sisters the said messuages, &c., for their dwelling or foundation or endowment, to have and to hold unto the said master, brethren, and sisters and their successors, &c., for ever. The property so granted with subsequent additions form the source from which the revenues of the charity are derived.

In 1752 the rents of the property had increased to a sum considerably in excess of the sum necessary for the current expenses and allowances of the house as they then stood.

In 1755 a suit in Chancery was instituted, which resulted in the approval by the Lord Chancellor of a scheme for the better management of the house and the application of its revenues. This scheme provided that fifteen men and fifteen women, feeble and old, should be placed in the said hospital, each of

whom should receive 3*s.* a week for maintenance, with an allowance for coals and turves, and that the number of rooms and the pay of the poor of the hospital should be increased or decreased in proportion to the increase or decrease of the revenues of the charity estate as the mayor and aldermen of Hull and the master of the said hospital should see convenient and direct. So things substantially remained till 1872, when a new scheme was formulated and legalised by the Charity Commissioners. That scheme did not, however, alter the existing state of the hospital beyond this: that the brethren and sisters of the Charter House were made removable at the pleasure of the town council, and on such removal his or her allowance was to cease. This power of removal has, however, never yet been exercised. At present there are about eighty brethren and sisters, each of whom receives 7*s.* weekly.

It is found as a fact that the houses and lands forming the charity estate, and from whence the revenues are derived, are still vested in the master, brothers, and sisters. It is also found as a fact that one necessary qualification for election to the charity still is that the brothers and sisters should be feeble, or old and necessitous, and, further, that they are elected by the town council. The brethren are required by the rules to keep within the hospital premises, and the gates are closed for the night at 10 P.M. Hitherto the brethren have always voted in parliamentary elections without objection.

Jelf, Q.C., and *Grotrian*, for the appellant. The revising barrister was wrong. The appellant was not in receipt of "alms such as by the law of Parliament disqualify" within s. 36 of the Reform Act of 1832.

The case is distinguishable on the facts from *Harrison* v. *Carter* (1); *Baker* v. *Town Clerk of Monmouth* (2); *Edwards* v. *Lloyd* (3); *Dix* v. *Kent* (4); and is governed by the decisions in *Smith* v. *Hall* (5), *Fryer* v. *Bodenham* (6), *Roberts*

(1) (1876) 2 C. P. D. 26.
(2) (1885) 53 L. T. (N.S.) 608.
(3) (1887) 20 Q. B. D. 302.
(4) (1890) 1 Fox & Smith's Registration Cases, 186.
(5) (1863) 15 C. B. (N.S.) 485.
(6) (1869) L. R. 4 C. P. 529.

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v. *Percival* (1) *Simpson* v. *Wilkinson* (2), and *Daniels* v. *Allard*. (3)

The respondent did not appear.

Cur. adv. vult.

Dec. 21. HAWKINS J. read the following judgment:—This is an appeal from the decision of the revising barrister for the borough of Kingston-upon-Hull, removing the name of the appellant from the occupiers' list of voters for the central division of that borough, upon the ground that he was disqualified under s. 36 of the Reform Act of 1832 by the receipt of alms during the past year. [The learned judge stated the facts above set out, and continued:—]

By s. 36 of the Reform Act of 1832 it is enacted that "no person shall be entitled to be registered in any year as a voter in the election of a member or members to serve in any future Parliament for any city or borough who shall within twelve calendar months next previous to the last (now the 15th) (4) day of July in such year have received parochial relief *or other alms which by the law of Parliament now disqualify from voting* in the election of members to serve in Parliament." The question we have to determine is whether, under the circumstances, the appellant was within the year next before July 15 last in the receipt of such alms. It was not suggested before the revising barrister that the appellant has been in receipt of parochial relief; but it was objected that the appellant had received such other disqualifying alms as are mentioned in s. 36.

This objection was upheld by the revising barrister on the authority of *Harrison* v. *Carter* (5) and *Baker* v. *Town Clerk of Monmouth*. (6) It would be difficult to point to any authoritative definition of the law of Parliament upon this subject, and it would serve no good end to examine in minute detail such authorities as are to be found in the reports of the trial

(1) (1864) 18 C. B. (N.S.) 36.
(2) (1844) 7 M. & G. 50.
(3) (1887) 1 Fox & Smith's Registration Cases, 70.
(4) Now July 15th, by 41 & 42 Vict. c. 26, s. 7.
(5) 2 C. P. D. 26.
(6) 53 L. T. (N.S.) 668.

of election petitions before parliamentary committees, for they are conflicting beyond the power of reconciliation: many of them are to be found collected in Rogers on Elections (1), Part I. pp. 79, 189, et seq., to which I simply refer.

It is stated by Whitelocke, in his work on Elections, published in 1766 (2), that persons who are or have been within a certain time *obliged* to depend wholly or in part on eleemosynary assistance are disqualified by the common law, not only because from their indigence they were unable to contribute to the wages of their members, but because from their dependent situation their voices were no longer free. This receipt of alms, however, was only considered as *evidence* of inability which might be rebutted by circumstances. On the other hand, it was presumed that a voter continuing in possession of his freehold was not in a condition of disqualifying indigence, and that even parish alms paid to a freeholder did not invalidate his vote: *Bedfordshire*. (3) In dealing with the question, What are disqualifying alms? it is necessary always to bear in mind that the answer depends, not upon whether the person whose voting capacity is challenged has been the recipient of charitable assistance or alms in the popular sense of that term, but whether he has accepted such alms under such circumstances as by the law of Parliament (as it existed when the Reform Act of 1832 was passed) would have disqualified him from voting; and it must further be remembered that, although the onus of proving a primâ facie title to vote by reason of property, occupation, &c., rests on the person claiming to vote, the onus of proving affirmatively the disqualification to vote by reason of the receipt of alms is cast upon the objector. I may observe also, what I believe to be a generally accepted view, that a qualification should be favoured unless the law compels the contrary.

It is impossible to say that there was, when the Reform Act of 1832 was passed, any fixed, definite rule of parliamentary law

(1) 15th Ed., by Maurice Powell, 1890.

(2) Whitelocke's Notes upon the King's Writ, published by Charles Morton, M.D., London, 1766.

(3) (1785) 2 Luder's Election Cases, 564.

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which was applicable to every case. If there had been such definite rule, the conflicting authorities reported in the books would have made one marvel at the incompetence of some of those who were called upon to administer it. But the truth is there was no fixed principle at all to guide. Each case of necessity depended, as it still does, upon its own particular circumstances, and that state of things which in one place would have been held to be a disqualification might have been no disqualification in another.

It is truly stated in Rogers on Elections, Part I. p. 193, that in many of the old boroughs the *usage of the place* and the decisions of the House or committees have determined the point. In fact, the usage made the law. A perusal of the old election cases determined by parliamentary committees, some of which are referred to in pp. 193, 194, 195 of Rogers, abundantly prove this. In one borough usage sanctioned that which would have been condemned in another. If usage may be taken into consideration—and I see no reason why it should not—we have this very striking fact, found by the revising barrister, that certainly for sixty-four years since the Reform Act was passed, and I know not for how many years previous to that time, the brethren of this hospital at Kingston-upon-Hull have always voted without objection, nobody ever dreaming they were disqualified because of such charity as they have received. This concession of rights to vote is strong evidence that in fact the relief was not deemed to be of a character to disqualify.

It would certainly be a strong measure to disqualify so large a number of voters as the brethren now represent without overwhelming proof of their disqualification. Such I fail to find in the case submitted to us, upon which alone we must act, for we have no right to draw any inferences of fact which are not the irresistible conclusions to be drawn from facts actually found by the revising barrister.

I am not concerned to question the soundness of the two judgments relied on by the revising barrister as the basis of his decision: *Harrison* v. *Carter* (1) and *Baker* v. *Town Clerk of Monmouth*. (2) On the contrary, in each of those cases I think

(1) 2 C. P. D. 26.

(2) 53 L. T. (N.S.) 668.

there was evidence to justify the finding of the Court, namely, that there was that amount of poverty, and such a receipt of alms to alleviate it, as was calculated to destroy the independence of the recipient. But I do not concur in the revising barrister's opinion that they were decisive of the present case, for I think they are distinguishable in some substantial particulars.

In *Harrison* v. *Carter* (1) the lands forming the charity estate were devised to and vested in trustees—persons other than the claiming voter. Here they are vested in the brethren themselves, and the brethren, so long as they are such, live in houses of which they are for the time legal owners, and, though their right to occupy is dependent on the will of the trustees, the power of removal has never yet been exercised. Again, here the funds are to be distributed to feeble, old, or necessitous persons - necessitous not necessarily meaning persons in *extreme* poverty. In *Harrison* v. *Carter* (1) they were to be shared by the *poorest* inhabitants, and the particular voter whose vote was questioned was so needy as that (the money being distributed according to actual necessity) he was awarded the largest amount distributed to any one family. There was also this further fact, in *Harrison* v. *Carter* (1), that before 1867 the person who was removed from the register had never been in a condition to claim a vote, the house he occupied being of insufficient value; whereas in the present case the claimant had with his predecessors, for a longer period than 1832, been uninterruptedly allowed to vote in respect of the same qualification until 1896.

In *Baker* v. *Town Clerk of Monmouth* (2) poverty and inability to maintain themselves by their own exertions were found as the condition of the claimants to vote, and each occupant of an almshouse was required to wear a badge; and it was not suggested that any occupant had any freehold interest in the house he occupied. Following these two cases, *Edwards* v. *Lloyd* (3) and *Dix* v. *Kent* (4) might also be cited as supporting to some extent the objection of the respondent. Those cases, however, are distinguishable in their material facts from that now before

(1) 2 C. P. D. 26.
(2) 53 L. T. (N.S.) 668.
(3) 20 Q. B. D. 302.
(4) 1 Fox & Smith's Registration Cases, 186.

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us. They were both cases of alms-people occupying almshouses in charitable hospitals and receiving money allowances from the hospital funds, and the qualification for such charity in the first of them was (inter alia) inability of the recipients to maintain themselves by their own exertions; in the other the qualification was that the recipients had no means of subsistence other than the allowances from the hospital. In neither case was any legal interest in the almshouses vested in the alms-people, and it did not appear that the alms-people had for any substantial period (if at all) been allowed to exercise the franchise.

On the other hand, the case of *Smith* v. *Hall* (1) strongly supports the case of the appellant to have his name upon the register. In that case the persons objected to were on the list of voters as freemen of the borough of Sandwich; they were brethren of one or other of these two hospitals, St. Bartholomew's or St. John's, Sandwich, both of which were identical in their constitution and management, and both of which were under charity trustees appointed by the Lord Chancellor. Each was a corporation by repute; the property of each consisted of landed estates and houses occupied by the brethren. In each the income of the landed estates was divisible annually among the brethren in equal proportions, and a house was assigned to each brother wherein to live, and each brother kept the house occupied by him in repair. The appointment of the brethren to the hospitals was vested in the charity trustees, and there was no instance of a brother once appointed being turned out. There was no deed defining the qualifications of the persons to be appointed brethren; but in the year 1612, the mayor and jurats of Sandwich having the management of the hospitals, an ordinance was made by them that "every person placed in the hospitals should be of the age of 40 years or thereabouts, except always decayed jurats, or any lame, blind, or impotent person"; and by an inquisition of charitable uses taken September 7, 6 Car. 1, it was found that the brethren ought to be "above the age of 50, except lame, blind, or impotent persons, and unfit for husbandry, and should be inhabitants of the said town, or a child of some of them, or late inhabitants *having no competent*

(1) 15 C. B. (N.S.) 485.

means to live." The brethren had always theretofore voted for members of Parliament without objection. The persons objected to were all brethren, and had been recipients of the gratuities and other benefits for more than a year next previous to the last day of July, 1863. The revising barrister held they were not disqualified from being registered by s. 36 of 2 Will. 4, c. 45. An appeal against that decision was heard before Erle C.J. and Williams, Byles, and Keating JJ., who upheld it.

Erle C.J. in delivering his judgment said (1): "We should always incline to favour the qualification unless the law compels us to decide against it. If we are to resort to conjecture as to the meaning of the Legislature, which evidently was that persons so placed by their indigence as to be presumably subservient and destitute of all freedom of mind should not be permitted to exercise the franchise, I must own I should think that these freemen by reason of their having a house and a share in the profits of the land belonging to the hospital, for life, are gifted with a far greater probability of independence than those who have nothing to rely on but the precarious proceeds of their own labour." Williams J. agreed on the ground that the recipients of these benefits were not shewn to be in "a state of indigence and abject dependence." Byles J. agreed on the ground that the persons were residing in houses in which they were entitled by law to continue for life, sharing the revenues of the corporation; and he added that what a man receives as a matter of right cannot be treated as disqualifying alms. Keating J. said that usage was in favour of their qualification.

The case of *Daniels* v. *Allard* (2), wherein the question arose whether the inmates of the Licensed Victuallers' Asylum were disqualified as having been in the receipt of alms, is not of much assistance in the consideration of the main question before us. I therefore abstain from comment upon it. It does, however, decide that when there is a claim by a body of men to be placed on the register (all relying upon the same qualification as owners or occupiers), the disqualification by receipt of alms must be decided upon the case made and presented against the whole

(1) 15 C. B. (N.S.) 485, at p. 498.
(2) 1 Fox & Smith's Registration Cases, 70.

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body, and not by considering every possible case against particular individuals, unless in the case stated by the revising barrister a distinction is made between different members of the general body of the claimants.

The case of *Smith* v. *Hall* (1) is in my opinion more applicable to this case than the case of *Harrison* v. *Carter*. (2) I therefore, for the reasons I have set forth, after much consideration, have arrived at the conclusion that the appellant is entitled to our judgment.

CAVE J. I agree with the judgment that has just been delivered. I should like to add that I think the revising barrister was quite right in considering that he was bound to have regard to the decision in *Harrison* v. *Carter*. (2) But I think that decision was really in favour of the appellant in this case. Lindley L.J. there says (3): "Poverty alone will not do. If the fund is one in which the party is legally entitled to participate as in *Smith* v. *Hall* (1) he is not disqualified; but if his only claim to the exercise of the discretion of the trustees in his favour is his extreme indigence, it would seem to be otherwise." In the present case the appellant has a legal claim to participate in the funds until he is removed for some good cause.

Another case is cited by the revising barrister, that of *Baker* v. *Town Clerk of Monmouth* (4), to the decision of which I was myself a party. That case is not to be found in the regular reports, and I feel some difficulty about it. If it merely follows *Harrison* v. *Carter* (2) it is unnecessary to consider it; but if it is to be taken as dissenting from *Harrison* v. *Carter* (2), and as laying down that a person although legally entitled to participate in such funds is not entitled to vote, then I think it is wrong. I think it is quite possible that the revising barrister was misled by the report of that case.

WRIGHT J. concurred.

Judgment for appellant.

Solicitors for appellant: *Rollit & Sons.*

(1) 15 C. B. (N.S) 485.
(2) 2 C. P. D. 26.
(3) 2 C. P. D. at p. 37.
(4) 53 L. T. (N.S.) 668.

A. P. P. K.

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1897
Jan. 20.

Vaccination—Proceedings for Vaccination Order—Power of Vaccination Officer to take Proceedings without Authority from Guardians—Vaccination Act, 1867 (30 & 31 *Vict. c.* 84), *s.* 31—*General Order of Local Government Board, Oct.* 31, 1874, *art.* 16.

A vaccination officer is, without any special authority in that behalf from the guardians of the union for which he acts, empowered to take proceedings under s. 31 of the Vaccination Act, 1867, for an order directing an unvaccinated child to be vaccinated, notwithstanding the provisions of art. 16 of the General Order of the Local Government Board—Regulations under Vaccination Acts, October 31, 1874.

CASE stated by one of the justices of the borough of Ipswich.

An information was laid by the respondent, the vaccination officer acting for the Ipswich Union, and duly appointed by the guardians of the said union to prosecute persons charged with offences against, and otherwise to enforce, the provisions of the Vaccination Acts, against the appellant, that the respondent had reason to believe that Honora Bramble, a child under the age of fourteen years, being within the union, had not been successfully vaccinated, and that he had given notice to the appellant, the father of the child, to procure its being vaccinated, and that the notice had been disregarded. The appellant being summoned thereon to shew cause why an order should not be made under s. 31 of the Vaccination Act, 1867, directing the child to be vaccinated, it was admitted that the appellant was the father of the child, that he had on June 16, 1896, received the notice requiring him to have the child vaccinated within fourteen days, and that he had neglected to do so. The appellant, however, called upon the respondent to shew his authority to institute the proceedings. The respondent admitted that he had no special authority from the guardians of the union in the particular case, but produced a resolution of the guardians dated May 29, 1896, which was as follows:—

"Resolved that the resolution of the board forbidding the

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vaccination officer to take proceedings under the Vaccination Acts without the direct authority of the board in each particular case be rescinded, and that he be authorized to institute and conduct such proceedings against all persons in default under these Acts except in cases in which orders have already been obtained and summary proceedings taken under s. 31 of the Vaccination Act, 1867."

On the part of the appellant it was contended that the respondent must have special authority from the board of guardians to institute proceedings in each particular case, and that the general authority given by the above-mentioned resolution was invalid.

It was contended for the respondent that his appointment as vaccination officer was of itself sufficient to entitle him to institute proceedings without any authority from the board at all, but that if any authority were necessary the above-mentioned resolution authorizing him generally to institute proceedings against persons in default was enough. The justice held, on the authority of *Knight* v. *Halliwell* (1), that the contention of the appellant was bad, and made the order asked for subject to a case for the opinion of the Court.

Schultess Young, for the appellant. Upon the passing of the Vaccination Act, 1867, the officer intrusted with the duty of enforcing the Act could not institute proceedings under s. 31 (2) without first obtaining the authority of the guardians in each particular case, for by s. 27 he was half-yearly to furnish the

(1) (1874) L. R. 9 Q. B. 412.

(2) By s. 31 of the Vaccination Act, 1867, "If any . . . . officer appointed by the guardians to enforce the provisions of this Act shall give information in writing to a justice of the peace that he has reason to believe that any child under the age of fourteen years being within the union or parish for which the informant acts has not been successfully vaccinated and that he has given notice to the parent . . . . of such child to procure its being vaccinated and that this notice has been disregarded the justice may summon such parent . . . . to appear with the child before him at a certain time and place and upon the appearance if the justice shall find . . . . that the child has not been vaccinated nor has already had the small-pox he may if he see fit make an order under his hand and seal directing such child to be vaccinated within a certain time."

guardians with a list of all cases in which certificates of vaccination had not been duly received; and then if the guardians, on inquiry into the circumstances of the cases, found that the provisions of the Act had been neglected, they were to cause proceedings to be taken. By s. 17 of the Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 27 of the former Act was repealed. Then in 1874 came the case of *Knight* v. *Halliwell* (1), in which it was decided that the vaccination officer might proceed without special instructions, his action under s. 31 being freed from the restrictions imposed by s. 27. It was to meet that decision that art. 16 (2) of the General Order of the Local Government Board, October 31, 1874, was introduced. That article was evidently intended to be in substitution for the repealed s. 27. The effect of it is that the vaccination officer can now take no proceedings under s. 31 unless the guardians "give directions authorizing" him to do so. The "neglect" of the provisions of the Acts there referred to is neglect by the parent, not by the vaccination officer, for otherwise the article would have required the guardians not to "authorize" the officer to take proceedings, but to imperatively order him to do so. If the officer may still take proceedings without any special directions from the guardians the article is unmeaning. In *Robinson* v. *Lowe* (3) Wright J. seems to have been of opinion that special authority was now necessary, for he observed that "the practice of giving merely

(1) L. R. 9 Q. B. 412.

(2) By art. 16 of the General Order, October 31, 1874, "The guardians shall, in all cases in which the provisions of the Vaccination Acts for enforcing vaccination have been neglected, cause proceedings to be taken against the persons in default, and for this purpose shall give directions, authorizing the vaccination officer to institute and conduct such proceedings; but no such directions shall authorize the vaccination officer to take further proceedings under s. 31 of the Vaccination Act of 1867 in any case in which an order has already been obtained and summary proceedings taken under that section until he shall have brought the circumstances of the case under the notice of the guardians and received their special directions thereon."

By art. 17, "The vaccination officer shall take such proceedings as may be necessary under the Vaccination Acts in any case in which the Local Government Board may direct him to do so."

(3) (1896) 13 T. L. R. 19.

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general instructions to vaccination officers to prosecute was most improper."

Guy Stephenson, for the respondent, was not called upon.

WRIGHT J. I am afraid that this case has come here under a misapprehension of what I said in *Robinson* v. *Lowe*. (1) What I said was that a point might arise as to the effect of art. 16, and as to the propriety of the guardians giving general directions under it, but I did not profess to decide the point. As the law stood on the passing of the Act of 1867 the registrar, or other officer, had to submit a list of specific cases to the guardians and get their consent before instituting proceedings. But that law was altered in 1871; and the vaccination officer can now proceed without any special authority from the guardians, and further, if he neglects to take such proceedings as are necessary, he may be compelled to take them by order of the Local Government Board, under art. 17 of the General Order of October, 1874. But it is said on behalf of the appellant that art. 16 of that order re-establishes the law as it stood before 1871. It is said that by virtue of the provisions of that article the officer can only act under the directions of the guardians, and that those directions can only be given where they have specific cases before them in which the provisions of the Acts have been neglected. I think that that contention fails, and on two grounds. It may be that the article is badly expressed, and that it is capable of that interpretation; but I do not think that that is what was meant. I think that under that article the guardians may give their officer general directions before there has been any default. So that, even if it was necessary for the officer in the present case to get directions from the guardians, the general directions which were in fact given him were in my judgment a valid authority to proceed. But further, as I have already said, I do not think that he wanted any such directions. He may proceed under s. 31 of his own motion. I cannot agree that art. 16 is, as contended, a substantial re-enactment of the repealed s. 27. It is then said

(1) 13 T. L. R. 19.

that in that view that portion of the article is superfluous. I am inclined to think that it is so. I fail to see why it was wanted.

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BRUCE J. I agree that the vaccination officer is now entitled to take proceedings under s. 31 of the Vaccination Act, 1867, without first obtaining special authority from the guardians.

Appeal dismissed.

Solicitor for appellant: *A. S. Leighton, for Vulliamy, Ipswich.*

Solicitor for respondent: *Rexworthy.*

J. F. C.

THE LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* THE LLANDUDNO IMPROVEMENT COMMISSIONERS.

1896 *Dec.* 5.

Local Government—Rating—Land used as a Railway—Llandudno Improvement Act, 1854 (17 & 18 *Vict. c. cii.*), *s.* 68.

By the Llandudno Improvement Act, 1854, which authorized commissioners to make annually a general improvement rate upon all property for the time being liable to be rated to the relief of the poor, it was provided that "the occupier of any land used only . . . . as a railway" should be assessed in the proportion of one-fourth part only of its net annual value:—

Held, that the platforms at a railway station and the roof covering the railway, the platforms, and the sidings might be rated as land used only as a railway under this provision.

CASE stated by consent.

The appellants, the London and North Western Railway Company, are the owners and occupiers of a branch railway from Llandudno Junction to Llandudno, with its appurtenances, and a terminal station at Llandudno, which was constructed partly on land acquired under the powers of the St. George's Harbour Act, 1853 (16 & 17 Vict. c. ccxiii.), and partly on land acquired under subsequent Acts obtained by the appellants.

The respondents, the Llandudno Improvement Commissioners, were incorporated by the Llandudno Improvement

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Act, 1854 (17 & 18 Vict. c. cii.), and for the purposes of this case the railway and the Llandudno station are within the limits of that Act.

By s. 67 of that Act the respondents were empowered to make annually a rate or assessment, to be called the General Improvement Rate, upon all lands, estates, and property of every sort, kind, or description, for the time being liable to be rated to the relief of the poor within the limits of the Act according to the annual value of the same.

By s. 68 of the Act, "The owners and occupiers of houses, buildings, court-yards, and gardens, and all other property, shall be rated at the full net annual value of the same, provided always that the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market-gardens, or nursery-grounds, and the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall, so far as respects the said General Improvement Rate, be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

By s. 79, "And whereas the St. George's Harbour Company are or are about to become the owners and occupiers of land within the limits of this Act to be used for the purposes of their undertaking, be it enacted that nothing in this Act contained shall prejudice, lessen, or defeat the rights or interests of the said St. George's Harbour Company otherwise than by this Act expressly provided, and that the said company shall in respect of the railway works and property of the said company within the limits aforesaid be rated as follows: The line of railway (when constructed) for rating purposes shall be considered as agricultural, and shall be valued and rated in the same manner and proportion as the land abutting on each side of the line within the limits of the Act, and the station, buildings, and other hereditaments shall be rated in the same manner as other houses, buildings, and hereditaments within the limits of this Act are to be rated for the purposes of the Act."

On July 4, 1894, the respondents made a general improvement rate, in which they rated at their full net annual value, not only the station buildings, including waiting-rooms, offices, coal-sheds, stables, and goods-sheds belonging to the appellants, as to which there was no dispute, but also the roof, platforms, sidings, and other matters and things set out in the schedule to the case.

The appellants contended that this property ought, on the true construction of the Llandudno Improvement Act, to have been valued as agricultural land, and rated in the proportion of one-fourth of such value, or in the alternative at one-fourth of the full net annual value of such property.

The schedule to the case was as follows:—

(1.) Roof covering railway.
(2.) ,, ,, platform.
(3.) ,, ,, cab-drive.
(4.) ,, ,, sidings.
(5.) ,, ,, buildings.
(6.) Platform under roof.
(7.) Platforms uncovered.
(8.) Cab-drive under roof.
(9.) Cab-drive and horse-landing uncovered.
(10.) Cattle-landing and pens.
(11.) Crane in goods-yard.
(12.) Signal-boxes and appurtenances.
(13.) Engine turn-table.
(14.) Sidings and land.

It was agreed that items 1 to 11 were to be taken as being on land formerly used and occupied by the St. George's Harbour Company for the purposes of their undertaking. The remaining items were constructed on land acquired by the appellants under their subsequent Acts.

After notice of appeal against the rate had been given, the respondents admitted that in respect of items 12, 13, and 14 the appellants ought only to be assessed at one-fourth of the full net annual value.

The questions for the opinion of the Court were whether the appellants were liable to be assessed and rated in respect of

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the properties mentioned in the schedule in the proportion of one-fourth of the agricultural value thereof, or in the proportion of one-fourth of the full net annual value thereof, or whether they were liable to be assessed and rated in respect of the properties mentioned in items 1 to 11 of the schedule at the full net annual value thereof.

W. Graham, for the appellants. The appellants are entitled to the benefit of both ss. 68 and 79 of the Llandudno Improvement Act, 1854. The property included in the schedule ought to be considered as agricultural land under s. 79, and then rated at one-fourth of such value under s. 68. The words in s. 79, "station buildings and other hereditaments," mean something ejusdem generis with buildings, and cannot refer to the property in the schedule, which ought therefore to be considered as agricultural land: *Reg.* v. *Midland Ry. Co.* (1) A railway is none the less a railway because it is covered by a roof. Platforms have been held to be part of the railway: *South Wales Ry. Co.* v. *Local Board of Health for Swansea.* (2) In that case it was held that because platforms had been erected on land which was necessary for the support of the railway, they were themselves part of the railway. The turn-tables and sidings necessary for conducting the business of the railway have been also held to be part of the railway: *Midland Ry. Co.* v. *Council of Birmingham.* (3) In *North Eastern Ry. Co.* v. *Scarborough Local Board* (4) it was held that the sidings and strip of land adjacent to the railway were to be treated for rating purposes as part of the railway, except such part as was not necessary for the use of the railway. In *Purser* v. *Worthing Local Board* (5), a market-garden covered with glass was rated as a market-garden, and not as buildings, although the greenhouses were on brick foundations.

There is no distinction between the expression in s. 79, "line of railway," and that in s. 68, "land used as a railway," and all the property mentioned in the schedule falls within

(1) (1875) L. R. 10 Q. B. 389.
(2) (1854) 4 E. & B. 189; 24 L. J. (M.C.) 30.
(3) (1865) 13 L. T. (N.S.) 404.
(4) (1868) 33 J. P. 244.
(5) (1887) 18 Q. B. D. 818.

both descriptions. The appellants have by Act of Parliament succeeded to all the rights, duties, and liabilities of the St. George's Harbour Company; and they are entitled, therefore, to the benefit of s. 79, not merely in respect of the land actually acquired by the St. George's Harbour Company, but in respect of all land acquired by them for the purposes of their railway within the district of the Llandudno Improvement Commissioners.

The reason of the exemption in s. 68 is quite clear. The rate was imposed for watching, lighting, and other expenses, the benefit of which would be great to all buildings in the district, such as houses, shops, warehouses, &c., but which would be immaterial to the land. The distinction, therefore, is between land and buildings; and as the items in the schedule cannot be considered as buildings, they must be treated as land, and rated at one-fourth their value—whether that value be agricultural or not—under the provisions of s. 68.

Marshall, Q.C. (*E. Honoratus Lloyd* with him), for the respondents. The principle in all the cases has been to distinguish in rating railways between the line and the stations: *London and North Western Ry. Co.* v. *Wigan Union.* (1) In *South Wales Ry. Co.* v. *Swansea Local Board* (2) the principle of the decision was that the land on which the platforms were erected was actually necessary for the support of the line, and all that case decided was that land which would be rated as line did not cease to be so merely because it was covered by a platform. *North Eastern Ry. Co.* v. *Scarborough Local Board* (3) is a case of no authority. The point was abandoned in the course of the argument, and the decision, therefore, does not go any further than that of the *South Wales Ry. Co.* v. *Swansea Local Board.* (2) [He cited *Newport Dock Co.* v. *Newport Local Board.* (4)]

Sect. 79 only applies to land actually acquired for the purposes of the railway by the St. George's Harbour Company, and cannot apply to land subsequently acquired by the appellants. The words "line of railway" in it cannot possibly include the

(1) (1876) 2 Nev. & Mac. 240.
(2) 4 E. & B. 189; 24 L. J. (M.C.) 30.
(3) 33 J. P. 244.
(4) (1862) 2 B. & S. 708.

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items in the schedule, even if they are covered by the words in s. 68, "land used as a railway."

W. Graham replied.

POLLOCK B. This is an appeal against a general improvement rate made by the Llandudno Improvement Commissioners upon property belonging to the London and North Western Railway situate within the area governed by their Improvement Act. The case is stated for our opinion in respect of certain particular portions of the railway property which are designated in the schedule to the case, being numbered from 1 to 14.

Now the substantial question which has been argued before us is one, no doubt, of considerable importance, and I must for myself say that but for the decisions that have already passed upon this subject I should have taken time to consider what would be the true and sound rule of dealing with the rating of railways and adjuncts to railways. But it seems to me that the matter is already established by decision.

The question arises under s. 68 of the Llandudno Improvement Act, 1854, and that provides, first, "That the owners and occupiers of houses, buildings, court-yards and gardens, and all other property, shall be rated at the full net value of the same." That would include, by the specific mention of houses and buildings, all houses and buildings that were part of a railway station, because there is there a definite distinct denomination of the particular property which is rated, and that must be taken to govern, although in a minor sense those buildings may be said to be a part of the railway station. Therefore, so far as those buildings are concerned, no question can arise. But now comes this provision: "Provided always that the occupier of any land used" (I pass over the first part and go to the particular subject-matter in hand) "as a railway constructed under the powers of any Act of Parliament for public conveyance shall, so far as respects the said General Improvement Rate, be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof." Then comes the question whether the different specified lands beginning with No. 1 and ending with No. 11—lands and things

built upon the land—are within that provision a part of a railway constructed under the powers of an Act of Parliament, and so forth. I think the first decision in point of date on this subject is a decision in the year 1854, and that is the case of *South Wales Ry. Co.* v. *Swansea Local Board.* (1) In that case the Court seems to have come to a conclusion which, to my mind, is perfectly clear when the subject-matter is a road station, as it is commonly called, that is to say, where a railway is made upon an embankment, or made in a cutting so that there is at the side of the railway line the embankment in the one case and the bank of the cutting in the other, and upon that the station is built. Whatever may be the length of the platform, that station is obviously not only built for the purposes of the railway, and is of such a nature that without it the railway could not be properly used, but it is actually built upon land occupied by the railway land without which the rails themselves could not be properly maintained. The Court there clearly to my mind could only come to the conclusion that, because the company added to that embankment or to that bank of a cutting some further accommodation in the nature of a station and platform, then, apart from any question of buildings, that which was put upon land which already was freed from rating at more than one-quarter of its net annual value, as being a necessary part of the railway, could not itself be rated on a higher basis. But that case was not in respect of a terminus. It is quite clear to my mind that the same ground of decision would hold in the case of a terminus with regard to the actual lines of railway, and the platforms on either side of those lines of railway, if they were built upon land of the same character as that which I have just designated. But if the decision stopped there, there would be a manifest inconvenience, because the question whether the platforms of a terminal station should be rated or not would depend upon whether the lines came into the particular station upon an embankment, or in a cutting, or upon a dead level. If they came in upon a level, a great part of the grounds of argument upon which the judgment of the Court is founded in that case

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30.

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would not apply. I cannot but think, supposing that had been the case of a dead level, that still the Court would have come to the same conclusion, though not exactly upon the same grounds. But it is unnecessary to consider that, because it is quite clear by a decision which was in the next year, namely, *Adamson* v. *Edinburgh and Glasgow Ry. Co.* (1) (a decision of Lord Cranworth as Chancellor and Lord Brougham sitting with him), that any court dealing with the construction of an Act of Parliament for rating purposes in which the words "a railway" were used would be entitled to go beyond the mere physical rails and the land that those rails immediately rest upon. Without going through all the discussion that arose in that case and the different cases that are put by Lord Cranworth in his judgment, I think it is quite clear that this Court should obey the forcible reasoning of those two noble Lords in that decision. Beyond that I do not at all desire to give undue weight to that case, because there are many reasons why, when it is applied to the present case, it will be found that it is not a case in pari materia. Therefore I only cite it for the general ground of decision which is to be found within it. But there is another decision which, although it is very scantily reported, is one which I think we are bound loyally to obey, and one which is based to my mind on somewhat broader, and I cannot help thinking sounder, reasons than the *South Wales Ry. Co.* v. *Swansea Local Board.* (2) That is the case which arose upon a question as to how far this rule was applicable to the area occupied by the Scarborough Railway Station: *North Eastern Ry. Co.* v. *Scarborough Local Board.* (3) There three learned judges, Lush, Hannen, and Hayes JJ., all having the *Swansea Case* (2) before them, went further, and laid down the general doctrine that the word "railway" was not confined to the rails themselves and the land beneath them, but was to be applied to a case where there were platforms which it was not shewn were built absolutely upon land which was necessary for the support of the railway. They used broader words—words which to my mind are of

(1) (1855) 2 Macq. 331. (2) 4 E. & B. 189; 24 L. J. (M.C.) 30.
(3) 33 J. P. 244.

more general use in construing Acts of Parliament of this kind than any language that is to be found in the judgments in the *Swansea Case* (1), for they say that so much of the strip of land as is necessary to the use of the railway should be included as a part of the railway. That of course must be construed strictly. It must not be said that it is necessary to have a booking-office and this, that, and the other, for many reasons. I think that directly a thing becomes a building it comes under another distinct category in the section, and therefore is disposed of and dealt with in another way. The exemption in the section does, to my mind, apply to land which is not only parallel with and ends with the rails themselves, but also to land which is beyond the buffers—between the buffers and the street or public place with which the railway station communicates. Of course there must always be in all cases the question of degree, namely, how much is necessary for the use of the railway and how much is necessary merely for the convenience of passengers and others. If a railway company sought to take any more land than was directly necessary for the convenience and use of their line, then in that case as a matter of fact that portion which was not necessary ought to be excluded from the exemption given by such sections by any court or arbitrator before whom the case came. The result, therefore, of my judgment is that, (1.) the roof covering railway, (2.) the roof covering platform, (4.) the roof covering the sidings, (6.) the platform under the roof, and (7.) the platform uncovered—all those are included in the principle which I consider to be decided by these cases. But when you come (3.) to the roof covering the cab-drive, (5.) the roof covering the buildings, (8.) the cab-drive under roof, (9.) the cab-drive and horse-landing uncovered, (10.) the cattle-landing and pens, (11.) the crane in goods-yards, those are things to which, as it seems to me, those decisions do not apply; therefore they are properly rated upon the full net annual value.

Now with regard to the other part of the case, namely, the application of s. 79, I have very little to say, because it is clear to my mind that wherever the London and North

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30.

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Western Railway Company acquired land for the purpose of their undertaking, since the passing of that Act of Parliament they could not have the benefit of that section. That, of course, becomes much less important now, seeing what our judgment is with regard to the other part of the case.

WILLS J. I am of the same opinion. I will deal with the two questions in the inverse order, because I think a person who had to rate this property would begin by considering what land is to be treated as agricultural land and what is not to be so treated, and would then apply s. 68, relating to the assessment of certain lands and certain property at one-fourth of the net annual value. It seems to me, with regard to the application of s. 79, that the subject is really free from doubt. Sect. 79 is contained in the Llandudno Improvement Act, 1854, and it recites that the St. George's Harbour Company are about to become the owners and occupiers of land within the limits of the Act to be used for the purpose of their undertaking. Well, it is clear that means to refer to the fact that they had then obtained an Act of Parliament for carrying out their undertaking, but that the works remained to be constructed or be completed; and I think that it is quite clear that s. 79 meant to give the benefits which it does confer upon the undertaking to such works as should be constructed under that Act of Parliament, and to no others. It does not contemplate beforehand the possibility of other Acts of Parliament being applied for; and those words of the recital that the St. George's Harbour Company are about to become the owners confer an exemption or an advantage in respect of works to be constructed under their Act only. That disposes of the question as between the two classes of land. Then another question arises, namely, What is to be included under the term "line of railway" in s. 79? It seems to me that "line of railway" in that section is a very definite and specific expression, and that the use of the words "line of railway" shews that the advantage of being rated as agricultural land is confined to such land as is actually occupied by the rails. Of course I do not mean to say that it refers merely to the space between the

outside rails, but I think it is confined to whatever reasonably belongs to the line, and is necessary for the physical use of the rails as a line of railway. That would include Nos. 13 and 14, the engine turn-table and the sidings, and nothing else. It seems to me those are the only subjects which are entitled to the benefit of the rating as agricultural land under s. 79. None of the other matters in the schedule can, it seems to me, by any possibility or by any stretch of language, be designated as part of the line of railway. That disposes completely of s. 79 and its applicability.

Now comes the question, How much of this property is to be rated at one-fourth of its net annual value under s. 68? The Act was passed in 1854, but legislation upon similar lines is considerably older. It is found in a general public Act of 1848 (11 & 12 Vict. c. 63), s. 88. I suppose that is the first time in which it appeared except in local Acts; but from 1848 this legislation has been general. Therefore the question has arisen upon exactly the same words in the two cases to which my brother Pollock has alluded. I certainly find a difficulty in understanding the *Swansea Case*. (1) It seems to me that the ratio decidendi, if there be one, how much of the ground was necessary for the support of the rails, suggests a very unsatisfactory test. I cannot understand why the fact of the platform happening to be above a particular bit of land which is necessary for the support of the railway has anything to do with the matter, because different strata of property may be rated whether they are above or on or below the ground with reference to their occupation, and they may be treated as different subjects of rating. There is no difficulty about that. But this much is quite clear, that it is in accordance with the principle of *South Wales Ry. Co.* v. *Swansea Local Board* (1), that whatever is absolutely necessary for the physical use of the railway is to be treated as railway. That, I think, seems to be a sensible view, because it is quite clear that the expression "land used as railway only," which is the interpretation which has been put upon the phrase used in s. 68, is a very different expression from "line of railway." If it had been

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30.

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intended to confine the exemption given by s. 68 to "line of railway" the Legislature would have said so in unmistakable terms. Now, "used as a railway" means, I presume, its physical use as a railway. It does not mean those adjuncts to a railway which are necessary for convenient business purposes, or anything of that kind, but it means those things, whatever they be, without which the railway could not be used as a highway. It must not be forgotten that in 1848, when the first Act of Parliament using this language was passed, the theory was still alive in all our railway legislation that a railway was a highway, like a turnpike road, to be used by the public on certain terms as to tolls and otherwise. It seems to me that a railway could not be "used," in the general sense of the term, without such things as platforms. Looking at the rate at which railway trains go, they cannot be stopped everywhere to take people up and set them down. There must be stopping-places, and at these stopping-places there must be physical convenience for people getting into and out of the carriages. It seems to me that a platform is reasonably included under the expression "land used as a railway." I quite agree with my brother Pollock that very often it may be a question of degree. No doubt in many of our great railway stations there are parts of the platform which are not at all necessary for the purposes of the physical use of the railway, but which are used as lounges and convenient places for people standing about, and to make the whole thing more attractive. But in the present case there is no finding that the platforms are beyond what is reasonably necessary. Therefore it seems to me that we should be acting consistently with the principle of the *Swansea Case* (1) by holding that these platforms are part of the land used for the purposes of a railway.

The other case, the *Scarborough Case* (2), is certainly a definite decision in the same direction, and I think it is a decision notwithstanding that the point was given up by counsel. It was only given up in reply. It seems to have been argued, and the Court did not treat it as a matter of concession, but they say plainly that the appellants in that

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30. (2) 33 J. P. 244.

case were wrong in having claimed to treat the platforms and sidings as exposed to rating on their full net annual value. Certainly two of those learned judges had a very large experience in rating matters. I should suppose Hayes J. had as much experience in rating matters as any judge that ever sat on the bench; and, therefore, I do not think we are entitled to treat it, as Mr. Marshall says, as a case of no authority at all. I think the Court meant to decide what I have said, and I think they did decide it, although the point was given up by Mr. Manisty, who certainly was not in the habit, as far as my experience went, of giving up anything that he could contend for, or that he thought there was any chance of contending for successfully. Therefore I think we could not decide otherwise without flying in the face of a decision of a court of co-ordinate jurisdiction. I need not go through the items of the schedule again, because I agree entirely in the application of that principle to the particular numbers with which my brother Pollock's judgment has dealt.

Judgment for appellants.

Solicitor for appellants: *C. H. Mason.*

Solicitors for respondents: *Chamberlain & Johnson, Llandudno.*

A. P. P. K.

C. A.
1896
Dec. 9.

[IN THE COURT OF APPEAL.]

DIXON *v.* GREAT WESTERN RAILWAY COMPANY.

Railway—Railways Clauses Act—Fences—Liability to make and maintain Fences—Limitation of Time as to further Accommodation Works—Fence not made within Five Years of opening Railway—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 68, 73.

By s. 68 of the Railways Clauses Act, 1845, "The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (inter alia) sufficient fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting the cattle of the owners or occupiers thereof from straying thereout." By s. 73, "the company shall not be compelled to make any further or additional accommodation works . . . . after five years from . . . . the opening of the railway for public use."

The obligation on a railway company, under s. 68 of the Railways Clauses Act, 1845, to make and maintain fences is absolute, and is not affected by the limitation of time with regard to further accommodation works contained in s. 73, and a railway company are responsible to the occupier of adjoining land for injury to his cattle arising from neglect of the duty thrown on them by s. 68, although no fences were made within five years of the opening of the railway for public use.

Appeal from a judgment of Lord Russell of Killowen C.J. on further consideration, reported [1896] 2 Q. B. 333.

The defendants were owners of a railway constructed under a special Act incorporating the Railways Clauses Consolidation Act, 1845, and first opened for public use in 1857.

The plaintiff was occupier of certain meadow land, through which the line in question ran upon a viaduct carried on wooden piers. The height of the bottom of the viaduct from the ground was 5 ft. 3 in. The defendants did not erect any fence between the viaduct and the meadow, and the railway at that point remained unfenced down to the year 1884, when, in consequence of an injury to a horse of his, the then owner of the meadow erected a fence by nailing some rails to the supports of the viaduct. The fence so erected was an encroachment, as the defendants were owners of the land for some yards on either side of the viaduct; and they accordingly

removed it and erected a post and rail fence at the boundary of their land. This fence in course of time got out of order, and in September, 1895, two colts belonging to the plaintiff broke through it on to the land of the defendants and got under the viaduct, where one of them struck itself against the timber so violently that it received severe injuries and had to be destroyed. The plaintiff brought this action to recover the value of the colt. The jury found that the fence was rotten, that the colt was injured in consequence of the fence being rotten, and that the viaduct was dangerous without a proper fence. The learned judge gave judgment for the plaintiff. (1)

The defendants appealed.

Bucknill, Q.C., and *Lyttelton*, for the defendants. At common law a man is not bound to fence against his neighbour's cattle, and with some exceptions may keep his own land in a dangerous condition without being liable for damage arising thereby: *Ponting* v. *Noakes* (2); *Hilton* v. *Ankesson*. (3) Nor was there any statutory liability on the defendants under s. 63 of the Act, for by s. 73, after five years from the opening of their line they cannot be called on to make accommodation works: *Colley* v. *London and North Western Ry. Co.* (4); *Ryan* v. *Great Southern and Western Ry. Co.* (5) If the defendants were not bound to make the fence they were not bound to maintain it, but might pull it down or let it get into disrepair.

Montague Lush, and *W. Seton*, for the plaintiff. The 68th section contains no words limiting the time during which the obligation on the company to fence remains in force. The only relief from this liability is where compensation has been paid in lieu of accommodation works being made: *Corry* v. *Great Western Ry. Co.* (6) The sections that follow relate to procedure when accommodation works are asked for or erected, and s. 73 only limits the time during which such procedure can be put in force.

(1) [1896] 2 Q. B. 333.
(2) [1894] 2 Q. B. 281.
(3) (1872) 27 L. T. 519.
(4) (1880) 5 Ex. D. 277.
(5) (1892) 32 L. R. Ir. 15.
(6) (1881) 7 Q. B. D. 322.

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Bucknill, Q.C., in reply. *Corry* v. *Great Western Ry. Co.* (1) only decided that an agreement for compensation instead of accommodation works made with the owner did not affect the occupier.

LORD ESHER M.R. In this case the plaintiff brings an action against the railway company because they did not properly prevent his horse straying from a field, the result being that he was frightened by a train and knocked himself against the bottom of a viaduct, and had to be killed.

At the time the railway was made the company did not put up any fence at this part of the land which would prevent horses from getting under the viaduct, and it seems clear that if horses did go under the viaduct they were in danger of being injured, for a horse was killed there some years ago, and now this horse has been killed. Five years passed from the time when the line was made, and there was nothing that could be called an accommodation work, but there were free passages under the whole length of the viaduct, which was 5 ft. 3 in. high. When the first horse was killed, the owner of the land put up something which he thought would prevent other horses from going under the viaduct; but he did this on the land of the company. They took this down, as they had a perfect right to do, for it was a trespass on their land; but their doing so does not affect this case, which we must consider as if that protection had never been put up. What was the obligation on the company, treating them not as mere landowners, but as a railway company subject to the enactments of the Railways Clauses Act, 1845? The section with which we have first to deal is the 68th, and under it the company are to make, and at all times thereafter, that is after they have made them, maintain sufficient posts, rails, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the railway. There is a statutory obligation to make and maintain a fence without any limitation of time being

(1) 7 Q. B. D. 322.

stated. If there is nothing else in the statute on this point, how can it signify at what time this is done? They did in fact put up a fence and rails, with what intention is immaterial, and what they did prevented cattle straying from the land on which they were to the land of the company, and running into danger there. The complaint is that, having put up this fence, the company did not maintain it. The answer of the company is, that they were not asked within five years after they made the railway to put up any fence, and that therefore they were not bound either to make one or to maintain it when made—in other words, that s. 73 puts a limitation on s. 68, and takes away all liability under that section if the case can be brought within s. 73. It appears to me that the case does not come within s. 73. That section expressly deals with "further or additional works." If there are no works you cannot make further and additional ones, for you cannot add to works that do not exist. Unless those words are to be struck out, the case is not within the section. The true construction is that which the Lord Chief Justice has put on the Act, that it may be that the company could not be compelled after five years from the completion of the works and the opening of the railway for public use to make accommodation works, but that they are bound to fence, and if they do not must take the consequences.

The facts of this case do not bring it within s. 73; and so s. 68 remains without any limitation of time, and puts on the company the obligation to make and maintain fences which will prevent the cattle of people who have lands adjoining the railway from straying. It seems to me that that is the construction which Lush L.J. put upon this section in *Corry* v. *Great Western Ry. Co.* (1) I think, therefore, that this action was properly maintainable, and that the Lord Chief Justice, upon the findings of the jury, was right in ordering judgment to be entered for the plaintiff. The appeal must be dismissed.

LOPES L.J. I am of the same opinion. I do not propose to deal with the arguments which have been addressed to us

(1) 7 Q. B. D. 322.

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with regard to the common law. I think this case is entirely one depending upon the 68th section of the Railways Clauses Consolidation Act, 1845. That section, in my view, creates an absolute and permanent obligation upon the railway company to make and maintain certain accommodation works, and amongst them a sufficient fence for separating the land taken by them from the adjoining land not taken, and protecting such lands from trespass and the cattle upon them from straying thereout by reason of the railway. That appears to have been the view taken by Lush L.J. in the case of *Corry* v. *Great Western Ry. Co.* (1) Probably (and I think it is so) after the completion of the railway and the lapse of five years there was no power to go before justices to compel the railway company to make any of these accommodation works. It becomes then a duty of imperfect obligation, by which I mean it could not be enforced by the justices, but with regard to the duty so imposed there was an omission which the company made at their own risk, and if they failed to perform that duty, speaking now only of s. 68, and cattle were injured or other mischief occurred, I think under the provisions of the section they were liable.

There is a proviso to s. 68 which was relied upon, but I think it has no application, because it is not even suggested that any compensation was paid in this case instead of accommodation works being given.

That brings me to s. 73; because unless the company can in substance bring themselves within s. 73, in my opinion the case is concluded by s. 68. Now, does s. 73 give them a statutory release from any duty imposed upon them under s. 68? In order to understand s. 73, I think it is desirable to look at the preceding sections, beginning at s. 69. Those sections provide the mode by which accommodation works are to be obtained if any difference arises between the owner and the railway company, through the intervention of the justices, and they throughout deal with accommodation works which are to be given. Then comes s. 73, which deals with further or additional works. That section has no application here because this is not a case of further or additional accommodation works. There

(1) 7 Q. B. D. 322.

never were any accommodation works here: no fence was made as an accommodation work, there was no proceeding before the justices with regard to a fence, and for a good many years there was no fence there at all. That, therefore, leaves the case to be governed by s. 68, and, as I have already said, I think that section creates a permanent obligation upon the company to make and maintain a fence. We know as a fact that a former owner erected a fence himself, though I do not think that that has anything to do with the present case. He erected a fence, and in so doing he encroached upon the property of the railway company. They removed that fence and erected one of their own. I cannot help thinking that when they erected that fence, a fence clearly coming within the definition given by the 68th section, namely, a fence for separating their land from that of the adjoining owner, and protecting such lands from trespass, then the obligation imposed by s. 68 at once attached, and they were liable for neglect to maintain and keep that fence in repair.

Upon these grounds I think the decision below was right, and that this appeal ought to be dismissed.

RIGBY L.J. I am of the same opinion. When the Great Western Railway came to build their line over this particular piece of land they did not build it all the way on an embankment, but for a considerable space, said to be somewhere about one hundred yards, they had apparently a wooden erection on which they made their railway, and that left a considerable number of apertures about 5 ft. 3 in. high. The jury found that in that state of things the viaduct was a source of danger; and indeed it is obvious that if horses are kept where there are a series of holes 5 ft. 3 in. high, so that when they are going under a railway train comes right over them, there must be great danger of their being injured. Injury has been sustained, and the question is whether the defendants are liable. They do not prove any contract with the landowners or occupiers that by reason of the payment of compensation they should be relieved from any duty or obligation they were under. A suggestion was made with regard to the common law liability

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of the owner of land, and it was said that under the common law the railway company were not bound to fence. I should rather take the case where an owner is under a definite agreement with an adjoining owner to put up a fence and keep it in repair. No one can doubt, I think, that, if he does that and performs his agreement and puts up the fences, he is bound to keep them in repair for ever. Supposing that by accident, or by delay or negligence, the time for bringing an action against him for not putting up the fence has gone by, still that does not operate as a release from the agreement or covenant which he entered into; it only prevents the adjoining owner having a right of action at law. Suppose after the right of action at law had been lost by delay, the covenantor or the person who agrees to set up the fence does set it up, I cannot see any doubt that he is bound in law to maintain it for ever. Here the railway company were by s. 68 bound, amongst other things, to set up fences for the purpose of dividing the land they take from the land which they did not take, and to prevent the straying of cattle. That might be done at once if it were required by the owners; if not, it could be done at a convenient time. No accommodation works were made within five years, and it was found (as might have been foreseen) that it was dangerous when there were spirited horses in this place to have the viaduct without a protection. A former owner protected his horses by some sort of fence across the openings of the viaduct. If the railway company considered that a trespass, they had a perfect right to take down his fence and to set up another. They did set up a fence dividing their land from the land which they did not take, and it had the effect, which I see by the evidence of their own inspector it was intended to have, of preventing the cattle getting under the viaduct—that is, it prevented them from straying out of the adjoining land and getting under the dangerous viaduct of the railway company. I think this obligation to do what was necessary for keeping cattle from the dangerous viaduct was always an obligation on them, though it is not necessary to say whether it could have been enforced by mandamus or otherwise. So far they did their duty by setting up a sufficient fence, and, having done their duty so far,

I conceive that it was clearly obligatory upon them under s. 68 to keep and for ever maintain in repair that fence which they had set up in accordance with that duty. They failed in that, and damage ensued, and in my judgment they are liable for that damage, and the Lord Chief Justice's decision upon the findings of the jury was quite right.

Appeal dismissed.

Solicitor for plaintiff: *Graham Gordon.*
Solicitor for defendants: *R. R. Nelson.*

A. M.

BRADFORD, APPELLANT *v.* DAWSON AND ANOTHER, RESPONDENTS.

1896
Dec. 11, 19.

Gaming—Place used for Betting—"Betting with Persons resorting thereto"—Payment of Bets made elsewhere—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 1.

The respondent, a bookmaker, was charged with using the bar of a beerhouse for the purpose of betting with persons resorting thereto. He went to the beerhouse on several days, at the same hour in the evening of each day, and persons who had made bets with him elsewhere, and had won, came to the beerhouse, and he paid the bets to them in the bar.

On a case stated by a police magistrate:—

Held, that paying bets, previously made elsewhere, was not using the bar for the purpose of betting with persons resorting thereto, within the meaning of the Betting Act, 1853, s. 1, and the respondent could not be convicted.

CASE stated by a metropolitan police magistrate.

The respondent Dawson was charged for that he, on seven specified days in May, 1896, being a person using the Duke's Head beerhouse, did use the same for the purpose of betting with persons resorting thereto, contrary to s. 3 of the Betting Act, 1853. (1)

(1) 16 & 17 Vict. c. 119. By s. 1, "No house, office, room, or other place, shall be opened, kept, or used, for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of, such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting

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The respondent Parker was charged for that he, on the same days, being the occupier of the Duke's Head, did knowingly and wilfully permit the same to be used by Dawson for the purpose of betting with persons resorting thereto, contrary to the same section.

The following facts were proved:—

Parker was, at the date of the offences alleged against him, the licensee and rated occupier of the Duke's Head beerhouse.

Dawson carried on the business of a professional bookmaker.

On the seven days mentioned in the summonses Dawson was at the Duke's Head between 8 and 9 P.M., for the purpose of paying out to a number of persons, who came into the house for the purpose, sums of money which they had won from Dawson on bets made by such persons with Dawson on the result of horse-races.

Dawson, with the cognizance and connivance of Parker, always located himself in the private part of the bar, and at a corner of the counter close to a back room or parlour, which he was permitted by Parker to make use of at will. The habitual practice (which the magistrate found to have existed on the days mentioned in the summonses) was for the persons who had won bets, and who resorted to the house in considerable numbers for the purpose of obtaining payment of their bets, to present a slip of paper to Dawson, which they usually placed on the counter. Dawson would then look at the slip, step into the back room, come out again with another slip, and, after comparing the two, pay over to the person who had originally handed him the slip the sum of money which appeared to be due to such person. It was proved that Parker had full knowledge of the nature of the transactions carried out by Dawson.

No evidence was adduced on the part of the prosecution shewing the receipt by Dawson at the Duke's Head of any

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with persons resorting thereto; . . . . and every house, office, room, or other place, opened, kept, or used, for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law."

Sect. 3 imposes penalties.

slips of paper or money at the initial stage of the betting, neither was there any evidence to shew when or where the agreements or contracts, in pursuance of which the sums of money were paid over by Dawson, had been entered into and made. But the magistrate was satisfied that Dawson carried on the material part, as above set forth, of his business as a professional bookmaker in the Duke's Head, and used the house, to that extent, for the purpose of his business.

It was contended for the prosecution that the habitual user of the house by a professional bookmaker, for the purpose of meeting customers with whom he had betting transactions, and completing the betting transactions by settling up with them any bets with regard to which they were winners, amounted to a user of the house, contrary to the Betting Act, 1853. It was submitted that the paying out of bets was a most substantial and material part of the transaction of betting, and in support of this contention *Reg.* v. *Worton* (1) was referred to.

On the part of the defendants it was argued that the transactions which it had been proved Dawson was a party to could in no way be said to come within the Act; and for the defence the case, amongst others, of *Davis* v. *Stephenson* (2) was quoted.

The magistrate was of opinion that the facts proved did not in point of law constitute the commission by Dawson of an offence against the Betting Act, 1853. With regard to Parker, it was admitted by the prosecution that, if the user by Dawson was not illegal, the case against the licensee of the house failed also. The magistrate therefore dismissed both the summonses.

The question for the opinion of the Court was whether this decision was right in law.

Dec. 11. *Danckwerts*, for the appellant.

Grain, for the respondent Dawson.

L. W. Kershaw, for the respondent Parker.

The following authorities were referred to: *Davis* v. *Stephenson* (2); *Bond* v. *Plumb* (3); *Reg.* v. *Brown* (4); *Reg.* v. *Worton*. (1)

(1) [1895] 1 Q. B. 227.
(2) (1890) 24 Q. B. D. 529.
(3) [1894] 1 Q. B. 169.
(4) [1895] 1 Q. B. 119.

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THE COURT (Wills and Wright JJ.) directed that the case should be reargued before a Court consisting of five judges.

Dec. 19. *Danckwerts*, for the appellant. If the view taken by the magistrate is held to be right, the operation of the Act will be very much narrowed, for the result will be to enable all bookmakers to use public-houses for the purpose of settling their bets. If the bookmaker can use the bar to pay bets, he can also use it to receive payment of bets which he has won.

[HAWKINS J. The case shews that no part of the contract of betting was made in the house.]

Performance is part of the contract. Payment of bets is a material and substantial part of the business of a bookmaker. The case is within the words, as well as the mischief, of the Act.

Bigham, Q.C. (*Grain* and *L. W. Kershaw* with him), for the respondents. The short answer to the appellant's contention is, that, in order to convict on this information, betting in the bar of the beerhouse must be proved, and the case shews that no betting took place there.

HAWKINS J. I am of opinion that our judgment ought to be in favour of the respondents. The Betting Act, 1853 (16 & 17 Vict. c. 119), as is shewn by the preamble (1), was primarily intended for the suppression of betting houses. Sect. 1 creates the offence with which the respondent Dawson is charged, and which is, using a house, office, room, or other place, for the purpose of betting with persons resorting thereto. The facts are that the bets in question were made with the respondent Dawson, and the beerhouse kept by the respondent Parker was used by Dawson, with Parker's knowledge and permission, for the purpose of paying those bets, which had been made elsewhere, and which Dawson had lost. The question comes to this, whether paying bets, which have been already made and lost, is using a place for the purpose of betting, within the meaning of the Act. I cannot read s. 1 without most unhesitatingly arriving at the conclusion that

(1) The preamble is repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

this is not an offence, within the meaning of that section. The Act was intended to prevent persons using a house, office, room, or other place, for the purpose of betting with persons resorting thereto, but it does not follow that paying, in the bar of a beerhouse, bets, which have already been made elsewhere, is an offence, within the meaning of s. 1. The bets being over, and not having been made in the beerhouse (for there is no evidence to shew when or where they were made) the payment of those bets in the beerhouse does not come within the meaning of the Act. I am therefore of opinion that the magistrate was right in dismissing the summonses.

CAVE J. I am of the same opinion. When a man pays a bet which he has previously made and lost, that is not betting, any more than paying for wool, which a man has already bought at a different time and place, is buying wool.

WILLS J. I am of the same opinion. Betting is one thing, and paying the bet is another. The words of the statute are "for the purpose of" certain classes of persons "betting with persons resorting to" a house, room, &c. The payment of a bet made and lost is not "betting." The betting has been done before.

WRIGHT J. I am of the same opinion. I have entertained some doubt, on the ground that the Act is directed against the business of betting in the places therein referred to, and it seems hard to come to the conclusion that payment of bets is not an important element in the business of betting. If bets were not to be paid, they would not be made. However, the Act is a penal Act, and ought to be construed strictly; and I have not sufficient confidence in my own view to enable me to differ from the opinion of the other members of the Court.

KENNEDY J. concurred.

Judgment for the respondents.

Solicitors for appellant: *Wontner & Sons.*
Solicitor for respondents: *Charles Butcher.*

P. B. H.

C. A.
1897
Jan. 15.

[IN THE COURT OF APPEAL.]

In re An Arbitration between SPILLERS & BAKER, LIMITED, and H. LEETHAM & SONS.

Arbitration—Special Case—Order for Statement pending Arbitration—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 19.

It is no bar to the right to apply for a direction to an arbitrator to state, in the form of a special case for the opinion of the Court, a question of law arising in the course of the reference, that the arbitrator has expressed no opinion adverse to the party making the application.

Appeal from an order of Collins J., directing the executive committee of the Hull Corn Trade Association, Limited, to state a case for the opinion of the Court.

A dispute arose on the sale of a cargo of bran by H. Leetham & Sons to Spillers & Baker, Limited, to be delivered alongside steamer at Hull under the rules of the Hull Corn Trade Association, Limited. The dispute was referred to the executive committee of the Association. The matter came before the committee and evidence was given, and certain points were raised by the vendors, H. Leetham & Sons, on which they desired that the committee should state a case under s. 19 of the Arbitration Act, 1889. (1) This the committee declined to do, and application was made for an order directing them to state a case. The making of the order was opposed by Spillers & Baker, who now appealed against the direction of the learned judge that a case should be stated.

Montague Lush, in support of the appeal. The suggested questions of law are more questions of fact than of law, and until the decision of the committee is known it does not follow

(1) 52 & 53 Vict. c. 49, s. 19: "Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

that any questions of law will arise. It is, therefore, premature to make an order that a case shall be stated.

R. M. Bray, for the applicants.

A. Neilson, for the executive committee.

Lord Esher M.R. All the facts of the case were before the executive committee, and the points on which they were asked to state a case were placed before them. The committee had done nothing from which it could be gathered what they would decide. Under these circumstances it is said that Collins J. had no jurisdiction to make an order on the committee to state a case. If that contention were right, it would enable any arbitrator to prevent an order being made on him to state a case. All that he would have to do would be to refrain from making any statement of his views till his decision was published. It seems to me that this was not the intention of the Arbitration Act; and this is the view taken by the House of Lords in *Tabernacle Permanent Building Society* v. *Knight* (1), where it is pointed out that the object of s. 19 of the Arbitration Act was to give the courts a control over arbitrations while they are proceeding. Under these circumstances it is clear that we ought not to decide that it is a condition precedent to the right to order a case to be stated that the arbitrator has indicated in what way he will decide the point raised.

I think the learned judge had jurisdiction to make the order, and on the facts of the case I do not think we ought to interfere with it.

Lopes L.J. The question is whether there is power to order an arbitrator to state a special case although no opinion hostile to the party making the application has been expressed on the point raised. All the facts of this case were brought before the executive committee, and also the points of law which were alleged to arise on those facts. To say that there is no right to apply for an order to state a case would be to make s. 19 of the Act nugatory, and would leave it in the power of the arbitrator to preclude the raising of points of law which the Legislature

(1) [1892] A. C. 298.

C. A. 1897

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intended that the parties should have the opportunity of raising. I think that the learned judge had jurisdiction to make the order, and rightly exercised his discretion.

Appeal dismissed.

Solicitors for applicants: *J. & A. Tilleard.*

Solicitors for respondents: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for executive committee: *Chester & Co., for Holden, Son & Hodgson, Hull.*

A. M.

1896 *Nov.* 10.

In re WOOD. *Ex parte* FANSHAWE.

Bankruptcy—Jurisdiction in Chambers—Charging Order—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Power of Registrar—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 93, 99—*Bankruptcy Rules*, 1886, *r.* 6.

The judge of the High Court in Bankruptcy has power as a judge of the High Court, though not under his bankruptcy jurisdiction, to make charging orders under s. 28 of the Solicitors Act, 1860; and inasmuch as it is a power to be exercised in chambers, he can delegate that power to the registrar in bankruptcy.

THIS was an application which raised the question whether there was any jurisdiction in Bankruptcy to make a charging order under s. 28 of the Solicitors Act, 1860.

In or about April, 1896, a receiving order was made against the above-named debtor, E. M. Wood.

On June 11 an application by Wood to rescind the receiving order was heard by the registrar, and was opposed by a firm of Davis & Cox, creditors of Wood for 23*l.* The registrar rescinded the receiving order on condition that Wood paid 23*l.* into court to answer the debt of Davis & Cox. On June 15 the money was paid into court; and thereupon Mr. Fanshawe, the solicitor who had been employed by Davis & Cox to prepare and file their proof of debt and to oppose the application to rescind the receiving order, applied for a charging order under s. 28 of the Solicitors Act, 1860, on the 23*l.* in court in respect of his costs as solicitor to Davis & Cox. This was opposed by Davis & Cox.

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On October 29 Mr. Fanshawe's application was heard by the registrar, who doubted whether the High Court of Justice, sitting in Bankruptcy, had jurisdiction since the Bankruptcy Act, 1883, to make such a charging order; and thereupon, at the request of both parties, referred the matter to the judge.

Hansell, for Fanshawe. Although the judge of the High Court in Bankruptcy has no power under his bankruptcy jurisdiction to make a charging order, yet, as a judge of the High Court, he can make such an order: *In re Suffield and Watts*. (1) Then the analogy of the common law practice in chambers applies, where charging orders can be made by the masters. The powers of the registrars in bankruptcy are defined by s. 99 of the Bankruptcy Act, 1883, and rule 6 of the Bankruptcy Rules, 1886. Reading the section and the rule together, it is submitted that the registrar can make the order, this particular jurisdiction not being excluded by the rule.

Muir Mackenzie, for the respondents. The Bankruptcy Court has no jurisdiction under the Solicitors Act, 1860, to make a charging order: *In re Suffield and Watts* (1); and the only jurisdiction given to the registrar in chambers is that conferred by the Bankruptcy Act, 1883. He has, therefore, no power to make such an order. The Rules of the Supreme Court, 1883, do not apply to bankruptcy proceedings.

Hansell, in reply. When the whole matter is in bankruptcy, the judge of the Bankruptcy Court is the only judge who can make the order, and he can make the order in chambers.

VAUGHAN WILLIAMS J. This is a reference to me by consent from the registrar. The first question I have to decide is whether the High Court in Bankruptcy has jurisdiction to make an order under s. 28 of the Solicitors Act, 1860. [The learned judge read the section, and continued:—]

In my judgment it is not possible for me to say, after the decision of the Court of Appeal in *In re Suffield and Watts* (1), that this Court has, in the exercise of its jurisdiction under the Bankruptcy Act, 1883, any power to make an order

(1) (1888) 20 Q. B. D. 693.

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under that section. But I think that as a judge not of the High Court sitting in Bankruptcy in particular, but as a judge "before whom any such suit, matter, or proceeding has been heard, or shall be depending," I have power to make the order under the section. I also hold that as a judge of the High Court I have power, though not under the bankruptcy jurisdiction, to make orders under the section. That disposes of the first point. Having that power, the question is, ought I to exercise it myself to the exclusion of its exercise by the registrar? It is a matter to be determined in chambers, and, that being so, it seems to me convenient that the registrar should determine it. But it is said that he cannot do so, because he gets his powers under s. 99 of the Bankruptcy Act, 1883, which says, "the registrars in bankruptcy of the High Court, and the registrars of a county court having jurisdiction in bankruptcy, shall have the powers and jurisdiction in this section mentioned, and any order made or act done by such registrars in the exercise of the said powers and jurisdiction shall be deemed the order or act of the Court"; and it is contended that those words can only refer to the powers which the judge is exercising in bankruptcy under the jurisdiction conferred upon him by the Bankruptcy Act, 1883, and that, inasmuch as this power is not exercised under that Act, the registrar cannot exercise it. I am going to decide what I think is convenient. There is no express rule laid down here. This is a jurisdiction to be in chambers; and it seems to me that, whether it is a jurisdiction which arises outside the Bankruptcy Act or not, the registrar should exercise it; and therefore I propose to hold that the registrar shall exercise it. I do not know whether I have any power at the present moment to prescribe a rule in this respect without referring to the Lord Chancellor; but, in so far as I have power to direct the registrar to exercise this jurisdiction, I so direct him. The matter must therefore go back to the registrar.

Solicitor for applicant: *H. H. Fanshawe.*
Solicitors for respondents: *R. Raphael & Co.*

H. L. F.

WILD *v.* SOUTHWOOD.

1896
Nov. 16.

Bankruptcy—Protected Transaction—Completed Execution—Charging Order on Share in a Partnership—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 23—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 49, 168.

A charging order under s. 23 of the Partnership Act, 1890, upon a judgment debtor's interest in a partnership, being a proceeding in invitum, is not a "transaction" protected by s. 49 of the Bankruptcy Act, 1883.

In re O'Shea's Settlement, [1895] 1 Ch. 325, followed.

When in such a case the partners by direction of the Court pay into court a sum of money in redemption or purchase of the interest charged, the transaction is not a "completed execution" within the meaning of s. 45 of the Bankruptcy Act, 1883.

Semble, if the money had been paid out to the execution creditor or the partners had paid him the money direct, he would have got a good title.

THIS was an application which raised the question whether the plaintiff, who had obtained a charging order under s. 23 of the Partnership Act, 1890, on the defendant's share and interest in a partnership business, was in the position of a secured creditor.

On April 20, 1896, the plaintiff obtained judgment in the Queen's Bench Division against the defendant for 147*l.* 8*s.* 6*d.* and costs; and on April 27 he obtained an order in the action, under s. 23 of the Partnership Act, 1890, charging the judgment debt and costs on the defendant's share and interest in a business he was carrying on in co-partnership with two other persons.

On May 23 the plaintiff took out a summons to enforce his charging order by a sale of the defendant's interest in the partnership property. At this time the plaintiff was not aware that the defendant had committed an act of bankruptcy on the previous April 17.

On June 1 a bankruptcy petition was presented against the defendant grounded on the act of bankruptcy he had committed.

On June 2 the plaintiff obtained an order on his summons of May 23, by which the defendant's partners were directed to

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pay into court to the credit of the action a sum sufficient to pay the judgment debt and taxed costs, without prejudice to the rights of the official receiver; and under this order the partners paid into court the sum of 156*l.* 10*s.*

On June 15 a receiving order was made on the petition, and adjudication followed.

On July 13 the plaintiff took out a summons in the action that the money in court might be paid out to him, which summons was at the request of Day J., by whom the action was tried, now heard by the judge in bankruptcy.

H. Terrell, for the summons. The plaintiff obtained his charging order without notice of an act of bankruptcy, and the transaction is therefore protected by s. 49 of the Bankruptcy Act, 1883.

[VAUGHAN WILLIAMS J. This charging order was a proceeding in invitum, and the decision in *In re O'Shea's Settlement* (1) shews that the protective section does not apply to such a proceeding.]

That was a decision on a charging order under the Judgments Act, 1838, and does not, it is submitted, apply to a charging order under the Partnership Act, 1890. But, assuming that it does, the charging order followed by the payment into court by the other partners was a completed execution within s. 45 of the Bankruptcy Act, 1883. The word "sale" in that section means a realization of the interest seized, and this execution creditor could only realize his security in the way provided by the Partnership Act, 1890. Further, the word "goods" in s. 45 does not include a share in a partnership, and therefore that section does not apply, and there is nothing to deprive the plaintiff of the charge he has obtained. Lastly, the money paid into court was no part of the bankrupt's estate. The partners in substance purchased the debt, and paid the purchase-money into court, and are entitled to the benefit of the charge. The money paid in was in no sense the property of the bankrupt.

Hansell, for the trustee in bankruptcy. The case of *In re O'Shea's Settlement* (1) disposes of the first point. Secondly,

(1) [1895] 1 Ch. 325.

the plaintiff did not become a secured creditor of the bankrupt within the meaning of s. 168 of the Bankruptcy Act, 1883, when he obtained the charging order, because at that date all the property of the bankrupt, by virtue of the doctrine of relation back, was vested in the trustee in bankruptcy as from April 17, the date of the act of bankruptcy. [He also referred to *Luther* v. *Wearing* (1); *Dibb* v. *Brooke & Sons*. (2)]

H. Terrell, in reply.

VAUGHAN WILLIAMS J. This is a summons which I have been asked to dispose of by Day J. The summons asks for an order that the 156*l.* 10*s.* paid into court by the bankrupt's partners under the order of June 2 may be paid out to the plaintiff. I am of opinion that I ought not to make the order that is asked for. The dates are agreed, and I must therefore take it that on April 17, 1896, the defendant committed an act of bankruptcy, and all these orders are subsequent to that date. Now, what are the rights of the plaintiff, who is the execution creditor? I will first deal with his rights, irrespective of s. 49, which is the protective section, or s. 45, which I think is a restrictive section. What is the right of the execution creditor? His right is to seize the goods or property of the bankrupt, and to levy execution thereon. He has no right to seize or levy execution on the property of any one else. Now, at the date when the first step towards getting execution, or anything in the nature of execution, was taken, was the interest of the bankrupt in the partnership property his property or not? If it was his property, the execution creditor had a right to go against it; if it was not, the creditor had no such right. The first step towards obtaining the charging order was the taking out of the summons on April 20, 1896, and at that time the bankrupt's interest in the partnership had ceased to be his interest. It had vested in the official receiver, and became the property of the trustee in bankruptcy in the events which happened. This law of relation back, which makes the title of the trustee vest as from a date antecedent to the transaction or event which took place without any petition in bankruptcy

(1) (1885) 17 Q. B. D. 182. (2) [1894] 2 Q. B. 338.

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having occurred or a receiving order having been made, operates no doubt very hardly in many cases, and therefore various Acts of Parliament have contained protective sections to relieve those persons who would be injured by the stringency of that law. Apart from those protective sections, it is plain that this execution cannot hold good against the trustee in bankruptcy whose title relates back to a period anterior to it. Then is this execution within the protective section? That is s. 49 of the present Bankruptcy Act. In my judgment this execution creditor cannot rely on that section, because, as I understand the case of *In re O'Shea's Settlement* (1), it is a distinct decision that the obtaining of a charging order under s. 14 of the Judgments Act, 1838, is not a "transaction" within the meaning of s. 49. But then it is said that decision does not apply to a charging order obtained under s. 23 of the Partnership Act, 1890. I do not accede to that argument at all. It seems to me that whether the charging order is obtained under the Judgments Act, 1838, or under the Partnership Act, 1890, it is a proceeding in invitum, and cannot be called a "transaction" within the meaning of s. 49. In effect, *In re O'Shea's Settlement* (1) decides that the transactions protected by s. 49 are voluntary transactions between the bankrupt and those with whom he is dealing. I think, therefore, that s. 49 does not apply. Then it is said that s. 45 assists this execution creditor. All I say is that, if it is a protective section, then the decision in *In re O'Shea's Settlement* (1) deprives him of the benefit of it. But if it is a restrictive section the question does not arise, because the restrictive section can clearly give him no larger rights than he would have under s. 49. I have therefore disposed of that part of the case. It remains for me to deal with the argument that this money paid into court ought to be paid out because it is not and never has been part of the bankrupt's estate. I do not agree with that at all. The Partnership Act, 1890, in effect gives to the continuing partner the right to buy out the execution; and in such a case the money might be paid direct to the execution creditor. I do not say what would have been the effect if the money had been paid out of court

(1) [1895] 1 Ch. 325.

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to the execution creditor. But having regard to the omissions from s. 49 of that which formed part of protected transactions in s. 133 of the Bankruptcy Act, 1849, I am disposed to think that the execution creditor would probably have got a good title. But I have not to decide that point. I have only to deal with the point made; and it seems to me that the money paid into court here represents the proceeds of the bankrupt's interest in the partnership just as much as if it had been actually sold. The bankrupt's interest has been redeemed or bought in by the continuing partners, and the money in court is part of the bankrupt's estate, divisible among his creditors, and must be paid out to the trustee; and, as Mr. Terrell does not insist on the trustee taking out a fresh summons for that purpose, I do order the money to be paid out to the trustee.

Solicitors for plaintiff: *Wild & Wild.*

Solicitors for trustee: *Field, Roscoe & Co., for Ford, Harris & Ford, Exeter.*

H. L. F.

THE CONSERVATORS OF HAYES COMMON, APPELLANTS; THE BROMLEY RURAL DISTRICT COUNCIL, RESPONDENTS.

1896 Dec. 17.

Justices—Jurisdiction—Commons—Digging Gravel for Roads—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 51—*Commons Act*, 1876 (39 & 40 *Vict. c.* 56), *s.* 20—*Discretion of Justices to refuse to make Order.*

By s. 51 of the Highway Act, 1835, power is given to a surveyor of highways to get and carry away gravel, &c., in any waste land or common ground. By s. 20 of the Commons Act, 1876, such right is not to be exercised, as regards certain classes of commons, "without the consent of the person or persons having the regulation or management of the same, or in default of such consent without an order of two or more justices in petty sessions assembled . . . . who may in their order prescribe such conditions as to mode of working and restitution of the surface as to them shall seem expedient."

The appellants having refused leave to the respondents to take gravel from a common, the latter applied to justices, who made an order under s. 20 of the Commons Act, 1876, on the express ground that the section only gave them power to prescribe the conditions under which the right

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given by s. 35 of the Highway Act, 1835, was to be exercised, and that they had therefore no discretion to refuse altogether to make an order:—

Held, that the decision of the justices was wrong, and that they had absolute discretion, under s. 20 of the Commons Act, 1876, to make or refuse to make an order.

CASE stated by justices of Kent.

A complaint had been preferred by the respondents, the Bromley Rural District Council, against the appellants, the Conservators of Hayes Common, charging that the appellants, being the persons having the regulation or management of the common, had refused their consent to the respondents to search for, dig, get, and carry away gravel and stones or other material in or from any part of such common.

The respondents were the highway authority for the district within which Hayes Common is situate, and the powers and duties formerly exercised by surveyors of highways under the Highway Act, 1835, had devolved upon them. They, or the highway authority for the time being, had for at least thirty years, and probably for a longer period, taken gravel from a pit, known as the Pond Gravel Pit, on Hayes Common without making any payment for the same. In the year 1868 a scheme for the management of Hayes Common was, in pursuance of the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), duly certified by the Inclosure Commissioners, and was confirmed by the Metropolitan Commons (Supplemental) Act, 1869 (32 & 33 Vict. c. lix.); the appellants were the persons having the regulation or management of the common within the meaning of s. 20 of the Commons Act, 1876.

The appellants having recently raised an objection to the respondents taking gravel from any part of the common, a formal request was made on behalf of the respondents to the appellants for their consent to the respondents digging, taking and carrying away for the repair of the highways in the parish of Hayes 450 cubic yards or loads of gravel per annum from the Pond Gravel Pit; the appellants refused to give their consent, on the ground that such removal would reduce the area of the common available for recreation, and would destroy its natural aspect and beauty.

The appellants contended that the right of the respondents as the highway authority to dig gravel on a common was merely a statutory privilege which was subject to the provisions of s. 20 of the Commons Act, 1876 (1), and that the highway authority could not now dig gravel on a common except with the consent of the persons having the management of the common, and in default of their consent without an order of justices, and that upon the facts of the case the justices ought not to make an order.

The respondents contended that the rights of the highway authority under s. 51 of the Highway Act, 1835, to take gravel from a common without paying for it was a beneficial right or profit à prendre which they still possessed; that by clause 36 of the Hayes Common Scheme their rights were expressly preserved, and that the powers and duties of the appellants under that scheme or otherwise were confined simply to regulating or managing the common and the taking of profits; that s. 20 of the Commons Act, 1876, did not take away the respondents' right, but merely prescribed the mode of procedure as regards taking gravel in case of dispute, and enabled the justices to impose conditions upon a highway authority in the exercise of such right, and that the justices were bound to make an order under the last-mentioned section authorizing the taking of gravel by the highway authority subject to appropriate conditions.

(1) By 39 & 40 Vict. c. 56 (The Commons Act, 1876), s. 20, "After the passing of this Act, where any common is regulated pursuant to this Act by a provisional order of the Inclosure Commissioners confirmed by Parliament, or is the subject of a scheme confirmed by Parliament under the provisions of the Metropolitan Commons Act, 1866, or the Metropolitan Commons Amendment Act, 1869, ... no surveyor of highways or highway board constituted in pursuance of the Highway Acts, or trustees of any turnpike road, shall search for, dig, get, or carry away gravel, sand, stone, or other materials in or from any part of such common which has not been set apart for that purpose with the sanction of Parliament, without the consent of the person or persons having the regulation or management of the same, or in default of such consent without an order of two or more justices in petty sessions assembled, and acting in and for the petty sessional division in which such common is situate, who may in their order prescribe such conditions as to mode of working and restitution of the surface as to them shall seem expedient."

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The justices were of opinion that the right of the respondents as the highway authority to take away gravel under s. 51 of the Highway Act, 1835, was preserved or was not injuriously affected by the Hayes Common Scheme, and was not taken away by s. 20 of the Commons Act, 1876, which section they considered was simply intended to enable the justices to impose proper conditions in case of the unreasonable exercise of the right to dig gravel by a highway authority, or in case of any matter giving rise to a dispute between them and the managers of the common, and that the respondents were entitled to continue to exercise the right subject to the conditions which the justices by their order imposed; that accordingly the justices were bound to make an order authorizing the respondents to take gravel subject to such conditions.

The question for the opinion of the Court was whether the justices came to a correct determination or decision in point of law.

J. F. P. Rawlinson, for the appellants. Under s. 51 of the Highway Act, 1835, the surveyor no doubt had an absolute right to get gravel on waste lands for the repair of the roads; but s. 20 of the Commons Act, 1876, prevents the exercise of any such right without the consent of the persons managing the common, or (failing their consent) without the order of two justices. It cannot be successfully contended that the justices cannot exercise a discretion, but are bound to make an order; this would, in effect, be equivalent to saying that the conservators have no discretion, for it would be useless for them to exercise any discretion if the highway authority has a right to dig gravel on the common, and can enforce that right by applying to justices. The intention of the section was to make the justices a kind of court of appeal from the conservators, so as to prevent a capricious and unreasonable exercise of their powers by the latter.

[He was stopped by the Court.]

Macmorran, Q.C. (*Clarke Williams* with him), for the respondents. It was not intended by s. 20 of the Act of 1876 to take away the right of the highway authority, which was an

absolute right under s. 51 of the Highway Act, 1835, and which was confirmed by s. 15 of the Metropolitan Commons Act, 1866, which prevented the taking away without compensation of a right of a profitable or beneficial nature over a common. The effect of s. 20 of the Act of 1876 is to give power to the justices to say upon what terms such a right may be exercised.

WILLS J. This case really lies in a nutshell. Down to the year 1876 it is clear that the predecessors in title of the respondents, that is to say, the surveyor of highways, had the right to take gravel on this common. There had been for many years legislation from time to time in the direction of treating commons more and more as spaces for recreation and for improving the public health, and in 1876 a further Act was passed for their regulation. When s. 20 of that Act was under consideration the framers of the Act had before them the fact of the existence of the right of the surveyor under the Act of 1835 to take gravel on the common, and with that knowledge before them they framed, and the Legislature passed, this section, which provides that such a right shall not be exercised without the consent of the person or persons having the regulation or management of the common affected. If the case stood there, it is unquestionable that the appellants would have the power to give their consent or to withhold it. But the Act goes further and provides for the case in which they refuse their consent. It says that gravel shall not be taken from the common without their consent or, failing that, without an order of justices, who may in their order prescribe conditions. There is no room for doubt as to the powers of the justices: they can make or refuse an order as they think fit. The power to make an order is conferred on them as a judicial act; they may in their order prescribe the conditions under which the right is to be exercised—that is to say, if they make an order at all, they can take care that the right shall be exercised in a reasonable manner. The case must go back to the justices to consider whether it is proper and reasonable that they should make an order;

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there is nothing to compel them either to make one or refuse one.

WRIGHT J. I agree.

Case remitted to justices.

Solicitors for appellants: *Horne & Birkett.*
Solicitors for respondents: *May, Sykes & Co.*

W. J. B.

1897
Jan. 18.

MOUNTIFIELD *v.* WARD.

Licensing Acts—Bonâ fide Traveller—Sale to, for Consumption off Licensed Premises—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 10.

The provision in s. 10 of the Licensing Act, 1874, that "Nothing in this Act or in the principal Act contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to bonâ fide travellers," does not authorize the licensed person to sell for consumption off the premises intoxicating liquor during the time at which the premises are required to be closed.

CASE stated by justices of Middlesex.

The respondent was summoned under s. 9 of the Licensing Act, 1874, for selling intoxicating liquor during the time at which premises for the sale of intoxicating liquors were directed to be closed.

The respondent was, on July 19, 1896, the owner of the Duke's Head public-house, and was licensed to sell thereon intoxicating liquors for consumption on and off the premises.

On Sunday, July 19, shortly before 11 A.M., two men proceeded to the Duke's Head taking with them two empty bottles. They were admitted to the house, and their empty bottles were, at a time when the premises were by law directed to be closed, filled with beer for which they paid. The men being so served with beer took the full bottles away to Waterlow Park, and there in company with other men consumed the beer. The beer was sold to them by the respondent for consumption off the licensed premises.

The justices found that the respondent truly believed that the said two men were bonâ fide travellers, and took all reason-

able precautions to ascertain whether or not they were such travellers.

It was contended for the appellant that the exemption provided by s. 10 of the Licensing Act, 1874, did not extend to sales of intoxicating liquors to be consumed off the premises.

The justices overruled this contention, and dismissed the information subject to a case for the opinion of the Court.

Danckwerts, for the appellant. The sale of liquor to a bonâ fide traveller which is authorized by s. 10 (1) is a sale for consumption on the premises only. The section says that "nothing . . . . shall preclude a person licensed to sell intoxicating liquor to be consumed on the premises from selling such liquor," &c. The words "such liquor" mean "liquor to be consumed on the premises." The object of the section in confining the privilege to the holders of on licences was to prevent the scandal of public drinking during church hours.

[WRIGHT J. Does not the finding of the justices that the defendant believed the purchasers to be bonâ fide travellers, and took reasonable precautions to ascertain whether they were or not, disclose a good defence to the information, having regard to the fact that the language of the later paragraph of s. 10 is perfectly general?]

No; for it cannot have been intended that a licensed person selling liquor to a purchaser who told him he was a bonâ fide traveller should be in a better position where the purchaser deceived him than where his statement was true.

(1) By s. 10 of the Licensing Act, 1874, "Nothing in this Act or in the principal Act contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to bonâ fide travellers. . . . ." "If in the course of any proceedings which may be taken against any licensed person for infringing the provisions of this Act or the principal Act relating to closing such person (in this section referred to as the defendant) fails to prove that the person to whom the intoxicating liquor was sold (in this section referred to as the purchaser) is a bonâ fide traveller, but the justices are satisfied that the defendant truly believed that the purchaser was a bonâ fide traveller, and further that the defendant took all reasonable precautions to ascertain whether or not the purchaser was such a traveller, the justices shall dismiss the case as against the defendant."

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G. Elliott, for the respondent. The words "such liquor" mean "intoxicating liquor." The words "to be consumed on the premises" are a description, not of the liquor, but of the kind of licence which must be held by a person to entitle him to sell. The reason why the privilege was limited to the holders of on licences was that fully licensed houses represent the old inns which were at common law under the obligation of providing travellers with refreshment.

In *Dames* v. *Bond* (1) it was held that a licensed person who sold liquor to a traveller for consumption on his homeward journey committed no offence in so doing.

[WRIGHT J. There the question was whether the purchaser, who had travelled several miles for the purpose of singing at a concert held on the licensed premises, ceased to be a traveller by reason of his having remained on the premises several hours for the purposes of the concert. The present point was not discussed.]

Danckwerts, in reply. The provision in s. 10 that a bonâ fide though mistaken belief that the purchaser was a traveller should afford a defence was introduced to meet the doubts on that point expressed in *Roberts* v. *Humphreys*. (2)

WRIGHT J. As to the construction of this section I do not think that there can be any real doubt; Mr. Danckwerts' contention must prevail. The necessity of the case points to the conclusion that the section contemplated a sale for consumption on the premises only; for if the liquor might be sold under it to be consumed off the premises it would be impossible to ensure that it should be consumed only by bonâ fide travellers. I think that the words "such liquor" refer not merely to "intoxicating liquor," but to "intoxicating liquor to be consumed on the premises." There ought therefore in this case to have been a conviction, unless the later paragraph of the section prevents us from so holding. That paragraph provides that, "If in the course of any proceedings which may be taken against any licensed person for infringing the provisions of this Act . . . . relating to closing . . . . the justices are satisfied

(1) (1891) 55 J. P. 503. (2) (1873) L. R. 8 Q. B. 483.

that the defendant truly believed that the purchaser was a bonâ fide traveller, and further that the defendant took all reasonable precautions to ascertain whether or not the purchaser was such a traveller, the justices shall dismiss the case." At first sight it looks as if it was intended that a well-founded belief that the purchaser was a bonâ fide traveller should afford a protection to the defendant in "any proceedings" for infringing the provisions of the Act relating to closing, which would include proceedings for selling during closing hours for consumption off the premises as well as for selling during those hours for consumption on the premises. But on reflection I think that, notwithstanding the generality of the language of that paragraph, the protection which it affords cannot be held to extend beyond the cases of sales of liquor which are permissible under the earlier part of the section, namely, sales of liquor to be consumed on the premises.

BRUCE J. I am of the same opinion. I think that the provisions of s. 10 were never intended to apply to a case like the present. A person who wishes to lay in a store of intoxicating liquor for consumption off the premises must do so either before or after prohibited hours. There is no doubt a difficulty in consequence of the wide language of the later paragraph of the section. But I think that that language must receive the more limited construction which my brother Wright has suggested. If we were to hold otherwise, we should be allowing a wider defence in the case of a defendant who sold liquor to a purchaser whom he erroneously believed to be a bonâ traveller, than in that of one who sold to a person who was such a traveller in fact—a result which can never have been intended by the Act.

Appeal allowed.

Solicitors for appellant: *Wontner & Sons.*
Solicitor for respondent: *A. M. Forbes.*

J. F. C.

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Dec. 3, 4, 7.

[IN THE COMMERCIAL COURT.]

CROCKER AND OTHERS *v.* STURGE AND ANOTHER.

Insurance, Marine—Policy—Construction—Termination of Risk.

A ship was insured by the plaintiffs "at and from Sydney to Newcastle, N.S.W., while there and thence to any port or ports place or places on the West Coast of South America . . . . while there and thence to any port or ports" in the United Kingdom. . . . The plaintiffs reinsured with the defendants a portion of their risk by a policy which was expressed to be "at and from Newcastle, N.S.W., to any port or ports place or places in any order on the West Coast of South America and for thirty days after arrival in final port however employed."

The ship sailed with a cargo of coal from Newcastle, N.S.W., and proceeded to Valparaiso, on the West Coast of South America, where she discharged her cargo; she there loaded a small quantity of ballast and sugar and sailed for Talcahuano, another port on that coast, in order to finish loading there a cargo for the United Kingdom; before reaching Talcahuano she was totally lost, the loss occurring more than thirty days after her arrival at Valparaiso:—

Held, that the expressions in the reinsurance policy, "port or ports place or places" and "final port," were not limited to ports or places of discharge and final port of discharge respectively, but must be construed to include ports or places of loading and final port of loading for the voyage to the United Kingdom; and that the plaintiffs, who had paid the claim of the owner on the original policy, were therefore entitled to recover from the defendants on the policy of reinsurance.

ACTION tried in the Commercial Court before Mathew J. without a jury. The action was brought to recover the sum of 100*l.* upon a policy of marine reinsurance. The material facts were these:—

By a policy of insurance dated December 2, 1895, underwritten by the plaintiffs, the sailing ship *Talavera* was insured "at and from Sydney to Newcastle, N.S.W., while there and thence to any port or ports place or places on the West Coast of South America $\frac{\text{and}}{\text{or}}$ islands adjacent in any order once or oftener while there and thence to any port or ports of call $\frac{\text{and}}{\text{or}}$ discharge in the United Kingdom $\frac{\text{and}}{\text{or}}$ Continent of Europe between Bordeaux and Hamburg both included and for thirty days in port after final arrival however employed." By a policy

dated December 30, 1895, the plaintiffs reinsured for 100*l.* a portion of their risk with the defendants, the risk so reinsured being described as "at and from Newcastle, N.S.W., to any port or ports place or places in any order on the West Coast of South America and for thirty days after arrival in final port however employed"; the policy contained the usual statement that it was a reinsurance subject to all the clauses and conditions of the original policy or policies, and to pay as might be paid thereon.

The *Talavera* sailed from Newcastle, N.S.W., with a cargo of coal, which she discharged at Valparaiso, on the West Coast of South America; she remained in that port upwards of thirty days, and there loaded about 600 tons of ballast and 150 tons of sugar, part of her cargo for the voyage to the United Kingdom; she then sailed for Talcahuano, another port on the same coast, to complete loading cargo for her homeward voyage, but before reaching Talcahuano she became a total loss by stranding. It was admitted that vessels sailing from Newcastle, N.S.W., with cargo for the West Coast of South America sometimes discharged at more than one port on that coast, and that vessels loading cargo on that coast for the United Kingdom sometimes loaded at more than one port.

The defendants refused to pay the amount underwritten by them on the ground that the loss was not covered by the policy, which only covered a voyage to a discharging port or ports on the West Coast of South America, and thirty days after arrival at the final port of discharge on such voyage.

Joseph Walton, Q.C. (*P. C. Morris* with him), for the plaintiffs. The risk was covered by the policy of reinsurance. The expression "port or ports place or places" is not confined to a port or place of discharge; apt words would have been inserted in the clause had it been intended so to limit it. Construed in accordance with the ordinary meaning of the language used, the clause includes ports of loading as well as of discharge. In the case of *The Aikshaw* (1) an attempt was made to limit the same words in a similar clause to ports of loading, but it

(1) (1893) 9 T. L. R. 605.

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was unsuccessful. The expression "final port" in the latter part of the clause is not limited to the final port of discharge, but includes the final port of loading for the homeward voyage. The clause should be read as though the names of all the ports on the West Coast of South America at which the ship was at liberty to call had been expressly inserted. The use of the expression "however employed" shews that the parties contemplated that the ship might be employed in other ways than in the discharge of cargo. [He also cited *Bermon* v. *Woodbridge*. (1)]

Boyd, Q.C., for the defendants. The original policy insured a round voyage, consisting of a cross and a homeward voyage; the policy of reinsurance insured the cross voyage only. The parties intended to draw a dividing line between the two voyages, and fixed it at thirty days after arrival in final port. The words "port or ports place or places" means ports or places on the voyage mentioned from Newcastle to the West Coast of South America with the coal cargo, and the expression "final port" means the last of those ports on that coast at which the ship in fact discharges her coal cargo; the loss, therefore, occurred more than thirty days after arrival at the final port of discharge. The words "final port" are in themselves more applicable to a port of discharge than to a port of loading. The words "however employed" refer to the thirty days which elapsed after arrival at the final port of discharge, during which period the ship, after completely discharging, might be looking for employment.

Joseph Walton, Q.C., in reply.

Cur. adv. vult.

Dec. 7. MATHEW J. This case raises a question of some interest, the rights of the parties depending upon the true construction of a policy of marine insurance, which is in the form commonly used in an important branch of trade; the claim is in respect of a total loss, while the defence is that the loss was not covered by the policy. The *Talavera* sailed from Newcastle, N.S.W., to Valparaiso with a cargo of coals, which had

(1) (1781) 2 Doug. 781.

been shipped in the ordinary course, and was intended to be discharged at the vessel's first port of destination. In the original policy the risk was described as being "at and from Sydney to Newcastle, N.S.W., while there and thence to any port or ports place and places on the West Coast of South America $\frac{\text{and}}{\text{or}}$ islands adjacent in any order once or oftener while there and thence to any port or ports of call $\frac{\text{and}}{\text{or}}$ discharge in the United Kingdom $\frac{\text{and}}{\text{or}}$ Continent of Europe between Bordeaux and Hamburg both included and for thirty days in port after final arrival however employed"; in the reinsurance policy now sued upon it is described as "at and from Newcastle, N.S.W., to any port or ports place or places in any order on the West Coast of South America and for thirty days after arrival in final port however employed." It is contended by the plaintiffs that the words "port or port place or places" in the policy of reinsurance include ports or places whether of discharge or loading; by the defendants, that they mean ports or places of discharge only. The ship arrived at Valparaiso, where she discharged her cargo, and remained upwards of thirty days; she there loaded 600 tons of ballast and 150 tons of sugar, and sailed for Talcahuano; while on her way to that port she became a total loss.

The plaintiffs contended that the loss was clearly covered by the policy of reinsurance, and was within its express terms; and that the clause describing the risk must be construed as if the names of the ports or places on the West Coast of South America, at which the ship might call, had been expressly named in the policy and Talcahuano had been one of them. The defendants, on the other hand, contended that the policy only covered the voyage to the port or place of discharge, and thirty days after arrival there; that there was a presumption in favour of the view that it applied to one voyage only to a port of discharge, and thirty days after arrival at that port; and that the expression "final port" was more applicable to a port of discharge than to a port of loading. But such an interpretation would in effect cancel a great part of the clause and make it useless; if the voyage to one port of discharge were all that was covered by the policy it was idle to insert the

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words "any port or ports place or places," and also the words "however employed." The latter words indicate that it was contemplated that the ship might be employed in other ways than in the discharge of cargo—for instance, while proceeding on a voyage from the port of discharge to the port of loading. Evidence was called by the defendants as to the customary meaning attached to this clause; but the witnesses failed to shew that they were indebted to experience for their views, and it was admitted that the point had never been raised before.

In the case of *The Aikshaw* (1) an unsuccessful attempt was made to shew that the words "port or ports place or places" in a policy covering a homeward voyage meant ports or places of loading only, and that a loss occurring before arrival at a port of loading was not covered. The words used in this clause must, in my judgment, be read according to their ordinary meaning, and they are sufficient to cover this risk. There is no reason in the nature of things why a policy of insurance or of reinsurance should not cover the whole of one voyage and a part of another, for one part of a voyage may be more perilous than the rest. In the present case the line between the risks to be insured against and those not to be insured against under this policy seems to be drawn at the expiration of thirty days from the arrival of the ship at her final port of loading. For the reasons given I am of opinion that my judgment must be for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for defendants: *W. A. Crump & Son.*

(1) 9 T. L. R. 605.

W. J. B.

[IN THE COMMERCIAL COURT.]

1896
Dec. 15, 16.

THE GENERAL INSURANCE COMPANY OF TRIESTE, LIMITED (ASSICURAZIONI GENERALI) *v.* CORY AND OTHERS.

Insurance, Marine—Policy—Warranty—Amount Insured.

A warranty in a time policy that a vessel shall not be insured beyond a named amount means that it shall not be effectively insured to a larger amount; such a warranty is not broken by the owner taking out a new policy to cover the probable deficiency upon a policy effected with an underwriter who becomes insolvent, although the total nominal amount insured is thereby made to exceed the amount limited by the warranty.

A time policy upon hull and machinery of a steamship valued at 12,000*l.* contained a proviso, "Warranted 2400*l.* uninsured." The owner effected time policies to the total amount of 9600*l.*, one of the policies being effected with a syndicate to the amount of 5000*l.* During the currency of the policies the syndicate stopped payment, and eventually the large majority of its members became insolvent. The owner, estimating that the syndicate policy was not effective for more than 2000*l.*, took out further policies upon the ship for 3000*l.* The ship was lost, and the total amount that the owner could in the most favourable event recover upon all the policies was less than 9600*l.*:—

Held, that there had been no breach of the warranty.

ACTION tried before Mathew J. in the Commercial Court, in which the plaintiffs sought to recover from the defendants the amounts underwritten by them in a policy of reinsurance effected by the plaintiffs with the Shipowners' Syndicate (Reassured), of which syndicate the defendants were members. The facts were as follows:—

By a policy dated June 19, 1895, the steamship *Saltburn*, of which one Barwick was the managing owner, was insured on his behalf with the plaintiffs for twelve months from June 5, 1895, to the amount of 500*l.*, the ship being valued in the policy at 12,000*l.* The policy contained a warranty in the words, "Warranted 2400*l.* uninsured." Including the insurance effected with the plaintiffs the owner effected insurances upon the *Saltburn* to a total amount of 9600*l.*, leaving 2400*l.* uncovered by insurance; of this 9600*l.* the sum of 5000*l.* was

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insured with the Shipowners' Syndicate (Reassured), the members of which underwrote the policy to the extent of the proportion of the total sum written opposite their names; the proportion of the 5000*l.* underwritten by the present defendants being six and a half thirtieths.

By a policy dated June 20, 1895, the plaintiffs reinsured with the Shipowners' Syndicate (Reassured), their risk of 500*l.* on the *Saltburn*;; the policy contained the clause "being a reinsurance of the Generali Company on same terms and conditions as original policy or policies, subject to all the clauses contained therein, and to pay as may be paid thereon."

On October 30, 1895, the Shipowners' Syndicate (Reassured), who were in difficulties, ceased underwriting and stopped payment, and on December 7, 1895, a circular, signed by the chairman of a committee of the syndicate, was posted at Lloyd's, the material part of which was as follows: "On behalf of the several underwriters of Mr. Corderoy's syndicate, we hereby beg to inform you that a committee has been appointed who will endeavour promptly to settle claims, collect the various proportions and wind up their accounts, and we shall be glad of your co-operation in this unfortunate business. The committee propose to meet for this purpose as often as necessary. May we ask those who hold policies to insure their risks elsewhere, and to cancel their existing policies, that without much delay we may meet as far as possible all outstanding demands." On December 16, 1895, at a meeting of the members of the syndicate, it was reported by their solicitors that members representing nine-thirtieths might be considered solvent, two-thirtieths doubtful, and nineteen-thirtieths unable to meet their probable liabilities in connection with the syndicate. Between December 16 and December 23, 1895, members of the syndicate representing seventeen-thirtieths became bankrupt, and other members representing five and a half thirtieths subsequently fell into the same condition.

The state of the affairs of the syndicate coming to the knowledge of the owner of the *Saltburn*, he decided to effect further insurances upon that vessel, and, being of opinion upon the materials available to him that the policy for 5000*l.* effected

with the syndicate was not an effective policy for more than 2000*l.*, he on December 21, 1895, effected other insurances to the amount of 3000*l.* upon her against total loss only; he did not cancel the policy of the syndicate or any part of it. On December 30, 1895, the *Saltburn* became a total loss by stranding.

The plaintiffs duly paid the amount insured by their policy to the owner of the *Saltburn*, who altogether received from the various underwriters (including the 3000*l.* insured on December 21, and also the amounts paid by the solvent members of the syndicate) the total sum of 8683*l.* 6*s.* 8*d.*; the gross sum which it was possible that he might receive, making no allowance for expenses, was 9308*l.* The plaintiffs duly claimed from the defendants, who were solvent members of the Shipowners' Syndicate (Reassured) their proportion, being six and a half thirtieths of the amount (500*l.*) of the policy of reinsurance; but the defendants refused to pay on the ground that there had been a breach of the owner's warranty that 2400*l.* should be uninsured, and that the vessel was insured to an amount exceeding 9600*l.* at the time of her loss.

Lawson Walton, *Q.C.* (*Carver* with him), for the plaintiffs. Whether the obligation imported into the policy is to be considered as a warranty of an existing fact, or as an undertaking in the nature of a condition that a certain amount is to be kept uninsured, there has been no breach. The warranty is not a warranty that there shall not be policies beyond the nominal amount of 9600*l.*; it means that there shall not be effective policies beyond that amount. If a policy becomes ineffective, the shipowner may repair the deficiency in his insurance; and a policy becomes ineffective in the commercial sense when the insurer says that he is unable to pay, which amounts in effect to a repudiation of his obligation. In effecting the subsequent policies for 3000*l.* the owner did no more than what was reasonable under the circumstances to implement the insufficiency of the original insurance.

Joseph Walton, *Q.C.* (*F. Laing* with him), for the defendants. There was a breach of the warranty by the shipowner in

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effecting policies to an amount exceeding 9600*l.* A warranty requires a strict and literal fulfilment; what it promises must be exactly performed: Arnould on Marine Insurance, 6th ed. p. 602. If there are subsisting contracts of insurance under which some one is liable for more than 9600*l.*, there is a breach of the warranty; otherwise it would be necessary to enter into the region of speculation as to the probable value of the policies in certain contingencies. When the owner effected the policies for 3000*l.*, only seventeen-thirtieths of the syndicate had failed, amounting to 2833*l.*, and these figures did not justify the amount of the new insurances. A policy of insurance does not come to an end upon the insurer saying that he cannot pay. The owner should have cancelled all bad or doubtful policies, and have effected a guarantee policy to cover them.

Lawson Walton, Q.C., in reply.

MATHEW J. This is an action on a policy of reinsurance of the risk on the ship *Saltburn*, the plaintiffs having paid the owner in respect of a total loss on the original policy. The original policy, which was a time policy for a year from June, 1895, to June, 1896, had been subscribed to the amount of 500*l.* by the plaintiffs, and had also been subscribed to the amount of 5000*l.* by the members of the Shipowners' Syndicate (Reassured). In the original policy the value of the ship was stated to be 12,000*l.*, and the ship was covered by insurances to the amount of 9600*l.*; and the policy contained the clause, "Warranted 2400*l.* uninsured." The meaning of this clause is perfectly plain: the owner was to be his own insurer to that amount, and to the extent of 2400*l.*, therefore, the owner was as interested as were the underwriters in the safety of the ship. The plaintiffs effected a reinsurance of their risk with the Shipowners' Syndicate (Reassured), the same association that had underwritten the original policy; the position of the syndicate, therefore, was that they were underwriters of the original policy to the amount of 5000*l.*, and of the policy of reinsurance to the amount of 500*l.* The policy of reinsurance was in the ordinary form, and was expressed to be made "on the same terms and conditions as the original policy or policies, subject

to all the clauses contained therein, and to pay as may be paid thereon."

What afterwards happened was this: the ship was totally lost on December 30, 1895, during the subsistence of both policies. After the loss all the underwriters of the original policies paid the owner except the members of the syndicate, which had stopped payment some little time before. When the plaintiffs' claim against the syndicate on the policy of reinsurance was put forward, the objection was made that the warranty in the original policy had been broken, that therefore the underwriters of that policy need not have paid under it, and that the defendants were not bound to pay under the policy of reinsurance. The question in the case is whether that defence is made out or not.

It appears that the syndicate stopped payment about October 30, 1895; it was generally known that a large number of the members were insolvent, and that it was not likely that any substantial portion of their liabilities would be liquidated. What did their stopping payment mean? To a man of business it would convey that the syndicate were intimating to those persons who were assured by them that if they wanted to be protected they must insure elsewhere. The assured could have no knowledge how the affairs of the various members of the syndicate would ultimately turn out; there was a general expectation that several of them would prove able to meet their liabilities, but that a far larger number would be unable to do so. This being the state of affairs, the owner of the *Saltburn* made inquiries as to the position of the members of the syndicate; their position is clearly indicated in a letter of December 7, 1895, contained in the admissions. This letter was signed on behalf of the syndicate by Mr. Miller, their chairman, and was addressed to the Committee of Lloyd's, by whom it was made public in the ordinary course. [The learned judge read the letter.] The meaning of that letter is perfectly plain: it suggests to the persons insured by the syndicate that they should treat their policies as cancelled and protect themselves elsewhere. It is true that the terms of that letter were not communicated to the owner of the *Saltburn*; but the fact that

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the letter had been sent and published was generally known; and the owner was put upon inquiry as to the position of the members of the syndicate. The result of his inquiries was that nineteen out of the thirty members were at that time insolvent, while the position of others was doubtful; as to a further number it appeared that there was reason to hope that they would be able to meet their liabilities. The owner thereupon made a perfectly proper and business-like calculation in all good faith as to his position with regard to the 5000*l.* policy, and he came to the conclusion that that policy was ineffective to the extent of 3000*l.*; he therefore effected on December 21 a further assurance for that amount with three other companies, 1000*l.* in each. On December 30 the *Saltburn* was totally lost. The objection taken by the defendants to the plaintiffs' claim for the amount insured by the policy of reinsurance was that by reason of the further insurances for 3000*l.* there had been a breach of the warranty in the original policy, and that as the plaintiffs as underwriters need not have paid upon that policy, so neither need the defendants pay the plaintiffs upon the policy of reinsurance.

The argument on behalf of the plaintiffs was in effect this: the amount had not been in point of fact exceeded; the question was one of fact, and there was no insurance beyond 9600*l.*; calculating the total amount received by the owner from the underwriters, including the 50 per cent. of their liability paid by the solvent members of the syndicate, together with the amount likely in the future to be received, the sum of 9600*l.* would not be exceeded, and therefore the owner was not effectively insured for an amount in excess of the limit, and there had been no breach of the warranty. For the defendants it was said that policies had in fact been taken out on this ship for an amount of 3000*l.* beyond the guaranteed amount of 9600*l.*, making a total insurance of 12,600*l.*, and that the warranty had therefore been broken. I cannot agree with the defendants' contention. The object of the warranty was that during the currency of the policy the owner should not be covered by insurance in respect of 2400*l.*; and I am satisfied that in fact he was not so covered. It was

not intended that the risk of the owner should exceed 2400*l.*; but if the defendants are right, his risk or liability far exceeded that amount. If he could not effect another policy without committing a breach of the warranty, his risk would not be underwritten as was originally contemplated. What is an owner to do under such circumstances? He has to protect himself as a prudent man would, and to protect himself at once; he cannot delay; he ought not to leave his ship uninsured for a single day. The course which the parties to the policy must have foreseen that he would take would be that he would at once cover himself by further insurance to the amount of any anticipated deficiency.

It is said, however, that he was not justified in doing so, and that there were several courses open to him. First, that he could have gone to the underwriters and have asked their consent to his taking out further policies; but this suggestion is not reasonable, for it is known perfectly well from the practice of underwriters that they would have told him to take the course he thought right, which would have left him just where he was. Then it is said that he might have taken out an additional policy at Lloyd's to cover the anticipated deficiency under the original policy; I am not aware that he could in fact have done so, but it is certain that he could not readily have done it, for he had no precise information to give to the proposed underwriters as to the probable result of the winding-up of the syndicate; that would therefore not have been a reasonable course for him to take. It is said that the owner must not be protected beyond the amount named in the original policy; but if the owner takes out a further policy and protects himself in respect of the amount underwritten by the defaulting underwriter, the warranty would not in my opinion be broken in the spirit or in the letter; for the effect of such an arrangement would be that there would be a double insurance of that amount, and the second set of underwriters would be entitled to any salvage recovered from the first set. That was what in this case the owner really did: he was doubly insured to the amount of 3000*l.* by the original policy and by the further policies; and if he received more than the 3000*l.*, the balance would go to the

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underwriters. The defendants contend that the old policies were and are alive, though not of much vitality; that they were more than pieces of paper, and were still policies, and that the warranty must be strictly construed; but it is possible by a strict construction to reach the point of absurdity, which would be done if the construction were so strict as to put the owner under a greater liability than that imposed upon him under the original policy.

Then it was contended that the policies to the extent of 3000*l.* might have been avoided by cancellation, and that the owner ought to have gone to the underwriters who had stopped payment and asked for a return of the premiums and the cancellation of the policies. But this is really an idle suggestion: the underwriters would have said they were insolvent and unable to meet the liabilities on their policies, and unable to return the premiums. But whether or not that would have been the result of an application to the underwriters, the assured would have learned from the letter sent to the Committee of Lloyd's the position taken up by them, and that they were advising the assured to protect themselves by insuring elsewhere and to cancel, or rather, I should say, to treat as cancelled, their existing policies: any man who was told that would have effected the insurances which the owner in this case did effect. It is impossible for the defendants successfully to contend that the owner committed a breach of the warranty when he did the very thing that they advised him to do. I am for these reasons of opinion that my judgment must be for the plaintiffs.

Judgment for plaintiffs.

Solicitor for plaintiffs: *H. H. Sherriff.*
Solicitors for defendants: *Ince, Colt & Ince.*

W. J. B.

SOUTHCOMBE *v.* GUARDIANS OF YEOVIL UNION.

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Jan. 23.

Vaccination—Neglect to procure Vaccination—Jurisdiction of Justices—Vaccination Act, 1867 (30 & 31 *Vict. c.* 84), *s.* 31.

The justice who, upon information that a child under fourteen has not been successfully vaccinated and that notice to procure its being vaccinated has been disregarded, signs a summons under s. 31 of the Vaccination Act, 1867, to the parent to appear with the child before him, need not be one of the justices hearing the summons, nor need he sign the order made at the hearing. Such an objection is an objection to the vaccination order itself; it is not a ground of objection to a subsequent proceeding for the recovery of a penalty from the parent for non-compliance with the order.

CASE stated by justices for the borough of Yeovil.

The appellant had been summoned to answer an information charging him with having unlawfully omitted to carry into effect an order of justices made under s. 31 of the Vaccination Act, 1867 (1), directing him to cause his child to be vaccinated within twenty-one days from the date of the order. Upon the hearing of the summons the appellant was convicted of the offence and was fined the sum of five shillings. The facts which were proved or admitted at the hearing were as follows:—

On July 30, 1896, an information was laid against the appellant before John Curtis, Esq., a justice of the peace for the borough, by whom a summons founded on such information

(1) By 30 & 31 Vict. c. 84 (The Vaccination Act, 1867), s. 31, if any registrar or vaccination officer gives information in writing to a justice of the peace that he has reason to believe that any child under fourteen in the union or parish for which he acts has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded, "the justice may summon such parent or person to appear with the child before him at a certain time and place, and upon the appearance, if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated, . . . he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time"; and if the order is not complied with the parent or person may be proceeded against summarily and, if he cannot shew a reasonable ground for omitting to carry the order into effect, is liable to a penalty.

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was duly granted. The summons was heard on September 1, 1896, when there were present on the bench the said John Curtis and three other borough justices, who duly adjudicated on the matter, the appellant being represented by a solicitor. A formal order was drawn up and signed by two of the justices present, but was not signed by the said John Curtis. The order was duly served on the appellant, but had not been complied with by him.

It was contended for the appellant that the language of s. 31 of the Vaccination Act, 1867, makes it necessary that the justice before whom the original information is sworn must not only sign the summons served on the appellant, but must also hear it and sign the order, and that the appellant, being served with an order not signed by such justice, had just ground for refusing to comply with it, it being a bad order.

The justices were of opinion that the justice who acted before the hearing need not be one of the justices before whom the case was heard and determined and by whom the order was signed, and further that the order was made by the said John Curtis, although not signed by him.

The questions for the Court were—(1.) whether the justice who signed the summons must hear it and sign the order; and (2.) whether the appellant was justified in refusing to comply with the order served upon him on the ground that it was not signed by the said John Curtis.

Schultess Young, for the appellant. The conviction was bad, being founded upon a vaccination order made without jurisdiction; the justice who signs the summons must make and sign the order. The words of s. 31 are so emphatic as to take the case out of the general provision of the Summary Jurisdiction Act, 1848, by which a summons can be heard by a justice other than the justice who issued it.

The respondent did not appear.

WRIGHT J. I have come to the conclusion, though with no great confidence, that this appeal should be dismissed. In the first place, I think that, as my Brother has suggested, the

objection has been taken at the wrong stage: it ought to have been taken to the vaccination order, and while that stands unquashed this point cannot be raised. In the second place I think that, as the Summary Jurisdiction Act is incorporated with the Vaccination Act, and as under the former Act a summons may be issued by one justice and determined by another, that provision may be applied to the present case. But the question is one of some difficulty.

BRUCE J. I am of the same opinion. It would entail very great inconvenience if the justice who issued the summons were the only justice who had jurisdiction to hear it; he might frequently be wholly unable to attend the hearing, and if he were ill or dead on the return-day it would be most unreasonable to insist upon a fresh application to another justice with a view to the issue of a fresh summons. I am further of opinion that it is now too late to take the objection. This is a proceeding upon the vaccination order; and if that order was irregularly made, it should have been appealed against.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Parkers & Co., for Rendall, Yeovil.*

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HOLLOWAY *v.* COSTER.

Vaccination—Neglect to procure Vaccination—Service of Notice—Vaccination Act, 1867 (30 & 31 *Vict. c.* 84), *s.* 31.

The notice given under s. 31 of the Vaccination Act, 1867, to the parent of a child under fourteen to procure its vaccination need not be served personally upon the parent, nor, if personal service be not effected, need it be proved affirmatively that it reached him. It is a question for the justices to determine upon the evidence in each particular case whether they are satisfied that the notice reached the person to be notified.

CASE stated by justices for the borough of Andover.

The appellant had been summoned to answer an information exhibited by the respondent under s. 31 of the Vaccination Act, 1867 (1), for having neglected to have his child vaccinated after having had due notice to do so. Upon the hearing of the summons the justices ordered the appellant to have the child vaccinated within twenty-eight days.

Objection was taken on behalf of the appellant that there was no proof of service of the statutory notice under s. 31 of the Act, inasmuch as that notice, if delivered otherwise than personally, must be shewn to have reached the person to be notified. The following facts as regards service of the notice were given in evidence. The respondent made out the notice in respect of the child, addressed it to the appellant, and handed it to one Plumley for delivery to the appellant. Plumley, who had been accustomed to serve county court summonses and other notices, took the notice to the appellant's house and gave it to a woman there, telling her that it was a vaccination notice; he would not swear that this woman was the appellant's wife, nor to the exact day, except that it was on the day after the

(1) By 30 & 31 Vict. c. 84 (The Vaccination Act, 1867), s. 31, if any registrar or vaccination officer gives information in writing to a justice of the peace that he has reason to believe that any child under fourteen in the union or parish for which he acts has not been successfully vaccinated, "and that he has given notice to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded," the justice may summon such parent or person, and may make an order for the vaccination of the child within a certain time.

notice had been handed to him by the respondent. The justices were advised that, if they were satisfied that the notice was served upon the appellant in a manner as effectual as if the respondent had properly addressed and posted it, the service would be good. The justices overruled the objection.

The case contained no formal question of law for the opinion of the Court, but it set out the appellant's application to the justices to state a case, in which application the point of law was stated as above.

Schultess Young, for the appellant. Notice to the parent is a condition precedent to the exercise of jurisdiction under s. 31: *Knight* v. *Halliwell* (1); it must therefore be shewn affirmatively to have reached the person to be affected by it.

The respondent did not appear.

WRIGHT J. I think that no particular mode of service of the notice is necessary; it is for the justices in each case to determine whether they are satisfied that it has reached the person to be notified. Here it was handed with other notices of a similar nature to a person whose profession it was to serve summonses; he took it to the appellant's house and left it there with a woman, but was unable to say whether she was the appellant's wife or was in charge of the house; neither did he recollect whether the particular notice left referred to the particular child by name. On these facts it was for the justices to say whether they were satisfied that the notice reached a person in such a relation to the appellant that they could infer that he had in fact received notice.

BRUCE J. I am of the same opinion. It was for the justices to determine whether the notice reached the party, and there was sufficient evidence to warrant them in saying that they were satisfied of that fact.

Appeal dismissed.

Solicitor for appellant: *Cheverton.*

(1) (1874) L. R. 9 Q. B. 412.

W. J. B.

1896
Dec. 10.

GOODLOCK *v.* COUSINS.

County Court—Execution—Sale of Goods claimed by Third Party—Title of Purchaser—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 156.

Where a claim is made to goods taken in execution by the bailiff of a county court, and the claimant does not make the deposit or give the security required by s. 156 of the County Courts Act, 1888, and the bailiff sells the goods under the authority given by that section, such sale gives the purchaser a good title to the goods, although it subsequently appears that they were the property of the claimant at the time of the seizure.

APPEAL from the judge of the Cheltenham County Court.

An action had been brought in the county court against the son of the present plaintiff, and judgment was recovered and execution issued against him. The county court bailiff seized certain goods at the son's house, amongst them being a horse, which was claimed in writing by the father, the present plaintiff, as required by Order XXVII., r. 1, of the County Court Rules. The high bailiff duly sent to the claimant a notice under Order XXVII., r. 1 (*a*), requiring him to make deposit or give security in accordance with s. 156 of the County Courts Act, 1888 (1), but the claimant failed to comply with the notice. The bailiff sold the horse by auction; it was bought and paid for by the defendant, and the money duly paid into court by the bailiff. The plaintiff then brought the present action against the defendant, the purchaser, to recover damages for the wrongful conversion of the horse. The learned county

(1) By 51 & 52 Vict. c. 43 (The County Courts Act, 1888), s. 156, "Where any claim shall be made to or in respect of any goods taken in execution under the process of the Court, the claimant may deposit with the bailiff either the amount of the value of the goods claimed, such value to be affixed by appraisement in case of dispute, to be by such bailiff paid into court, to abide the decision of the judge upon such claim, or the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods until such decision can be obtained, or may give to the bailiff in the prescribed manner security for the value of the goods claimed, and in default of the claimant so doing, the bailiff shall sell such goods as if no such claim had been made, and shall pay into court the proceeds of such sale to abide the decision of the judge."

court judge found as facts that the horse at the time of the seizure was the property of the plaintiff and not of his son, but that the defendant, when he bought it at the auction, had no notice that it was the plaintiff's property; he gave judgment for the plaintiff upon the ground that the sale by the bailiff gave the purchaser no title to the goods. The defendant appealed.

Stroud, for the defendant. The bailiff is compelled by s. 156 to sell the goods seized in execution, if the claimant does not comply with the requirements of that section as to making deposit or giving security, and such a statutory sale gives a good title to the purchaser.

Cranstoun, for the plaintiff. The section was intended for the protection of the bailiff; its object is not to bar a claimant of his right to follow goods which have been improperly seized, and the sale by the bailiff confers no title to the goods as against the true owner. [He cited *Chapman* v. *Speller* (1); *Davies* v. *Wise* (2); *Hills* v. *Renny*. (3)]

Stroud, in reply, cited *Death* v. *Harrison* (4); *Ex parte Villars, In re Rogers* (5); *King* v. *England*. (6)

WILLS J. This is a case of the first impression, and is also one of some importance, in which I would reserve my judgment if I thought it necessary. I do not think, however, that further consideration would alter the view which I took at the outset, that this transaction is a sale, and that the case is brought within the very language of s. 156 of the County Courts Act, 1888, and the conditions there laid down. Without discussing the effect of a sale made under other conditions, we have here a sale of goods seized in execution where there is a statutory duty on the bailiff to sell, and to sell, not, as the sheriff does, merely the interest of the debtor in the goods, but the goods themselves. Were we to hold otherwise than we are doing, we should be saying that the statute directed the bailiff to sell

(1) (1850) 14 Q. B. 621; 19 L. J. (Q.B.) 239.
(2) (1881) 7 Q. B. D. 425.
(3) (1880) 5 Ex. D. 313.
(4) (1870) L. R. 6 Ex. 15.
(5) (1874) L. R. 9 Ch. 432.
(6) (1864) 4 B. & S. 782; 33 L. J. (Q.B.) 145.

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goods in cases where by such sale he could give no title to them, and could transfer to the purchaser nothing but a lawsuit. What has been done here is consonant with what is done every day in chambers in cases of interpleader where the sheriff is directed to sell, although the claimant alleges title to the goods. I have certainly never heard of a case where after a sale under the order of the Court the claimant has been allowed to follow the goods and the purchaser has been held to have acquired no title to them, though, if the respondent's contention were accurate, the opportunity for raising such a point must have occurred over and over again. It seems to me that the respondent's contention admits of a very short answer; the statute says that the bailiff is to *sell* the goods, and such a provision would be nonsense if the sale gave no title to the purchaser.

WRIGHT J. I am of the same opinion, though I recognise the difficulty and importance of the case; and not the less so because in *Hills* v. *Renny* (1) the judges did not express any opinion on the point.

Appeal allowed; leave to appeal.

Solicitors for plaintiff: *Peacock & Goddard, for Lamb, Cheltenham.*

Solicitors for defendant: *W. H. Martin & Co., for Heath, Cheltenham.*

(1) 5 Ex. D. 313.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1896
Dec. 17.

LORD GERARD, APPELLANT; THE KENT COUNTY COUNCIL, RESPONDENTS.

Highway—Extraordinary Traffic—Person by whose Order Traffic is conducted—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict.* c. 77), *s.* 23.

The appellant was owner of a house and land in respect of which he was undertaking building and other operations, which he intended to carry out himself and not by means of contractors. Samples of the various materials which he required were submitted to and approved by him, and the persons proposing to supply the materials gave an inclusive price for the same delivered free. No contract was entered into for the supply of specified quantities of the materials, nor was the appellant bound to take any, but he gave information from time to time of the amounts that he required, and they were delivered accordingly. The manner in which the materials were to be brought was left to the persons who supplied them, but the appellant knew that the delivery would be by means of traction-engines, and that it would have been impracticable to deliver in any other manner at the prices named. The traffic caused by the carriage of the materials was extraordinary traffic, and damaged a highway which the respondents were liable to repair. On a case stated by quarter sessions:—

Held, by Lord Esher M.R. and Rigby L.J., Lopes L.J. dissenting, that the appellant was not a person by whose order the traffic was conducted within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878.

APPEAL from a judgment of the Divisional Court on a special case stated at quarter sessions.

The appellant was summoned at petty sessions to answer a claim made by the respondents for damage done to a portion of the Faversham and Ashford main road, in the county of Kent, by conducting excessive weight and extraordinary traffic along the road, and was ordered to pay a sum of money, being the proportion of the expenses incurred by the respondents in repairing the damage done to the road over and above the average cost of repairs. On appeal to quarter sessions the order of justices in petty sessions was reversed, subject to a special case from which the following facts are taken.

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The respondents were the authority liable to repair the highway above mentioned, and incurred extraordinary expenses in repairing it by reason of damage caused by extraordinary traffic.

The appellant was the owner of a mansion-house and park known as Eastwell Park, and in the years 1893 and 1894 building and other operations on an extensive scale were carried out. Several firms of contractors were employed on different portions of the work; but besides the work done by them a considerable amount of work was done by the appellant under the superintendence of Stephen Kavanagh, acting as servant to the appellant.

With regard to the supply of materials for the work executed for the appellant under the superintendence of Kavanagh, the facts were as follows: Before any materials were ordered samples were submitted to and approved by the appellant himself, or the architect or the clerk of the works on his behalf, and when a sample was approved the person proposing to supply the material was asked to give an inclusive price for the material delivered free at Eastwell Park. The manner in which the materials were brought was left entirely to the contractor who provided them.

When a sample of any materials had been approved, and an inclusive price agreed on, orders were from time to time given to the person who was to supply the material to deliver it at Eastwell Park in such quantities as were from time to time required. In no case was any contract entered into for the supply of any specified quantity of materials, nor was the appellant bound to take any materials at all.

Among the materials supplied were bricks and brick rubbish, which one Tabrett agreed to supply according to sample. He obtained the materials at Faversham and employed a traction-engine proprietor to haul them from thence to Eastwell Park.

Cement and gravel were also delivered under similar conditions at Eastwell Park; a part of the cement came from Wye Station, and did not pass over the road in question.

It was not specified when arrangements were made for the material to be delivered that it was to be or would be delivered

by traction-engine, but it was known to the appellant and the clerk of the works that it would be so delivered, and it would not have been practicable to deliver it in any other manner at the price named.

The Court of Quarter Sessions were of opinion that the traffic caused by the carriage of materials for the works at Eastwell Park, which were carried out by the appellant under the superintendence of Kavanagh, was extraordinary traffic and had done damage to the road.

They found as facts that the materials ordered for the work were ordered upon the terms of their being delivered at the park at prices which included delivery, and that neither the appellant nor Kavanagh directed or had any control over the mode of carriage of such material.

They found that the appellant knew that the delivery would be conducted by traction-engines. They held that the appellant was not a person by whose order the traffic was conducted within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878 (1), and they reversed the order of the court of summary jurisdiction.

The Divisional Court (Cave and Wills JJ.) reversed the decision of the Court of Quarter Sessions, and gave judgment in favour of the respondents.

The appellant appealed.

(1) 41 & 42 Vict. c. 77, s. 23: "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid.

"Provided that any person against whom expenses are or may be recoverable under this section may enter into an agreement with such authority as is mentioned in this section for the payment to them of a composition in respect of such weight or traffic, and thereupon the persons so paying the same shall not be subject to any proceedings under this section."

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1896. Nov. 19. *Channell Q.C.*, and *Edwardes Jones*, for the appellant. The judgment in the Divisional Court seems to have proceeded on the ground that the vendors of the materials supplied were not contractors; but if they were not that fact would not make the appellant liable. The question is not who gave the orders for the materials, but who gave orders for the traffic. The vendor had a choice of roads and had a right to carry over any road that he chose, subject to payment for damage done by the traffic. This payment should fall on the person who does the damage which is incident to the mode of conveyance, and not on the appellant, who had no control over the mode of conveyance or the weight carried at one time. In *Kent County Council* v. *Vidler* (1) the respondents who were held liable for extraordinary traffic employed the owners of traction-engines, and gave orders for the carriage of the ballast as it was required; but that decision does not govern the present case.

[They cited *Williams* v. *Davies* (2); *Lapthorn* v. *Harvey* (3); *Whitebread* v. *Sevenoaks Highway Board.* (4)]

R. M. Bray, and *Hohler*, for the respondents. The section contemplates the case of a highway damaged by excessive weight and extraordinary traffic, for which the person really responsible is to pay. The person who is made responsible for the aggregate which amounts to extraordinary traffic is not the person who carries, but the person who orders, that is, the person who gives orders the natural and ordinary consequence of which is the conduct of extraordinary traffic. Directly the appellant accepted a tender the vendor was bound to supply the amounts as they were ordered: *Great Northern Ry. Co.* v. *Witham* (5); and the appellant was the person who determined what those amounts should be, that is, the person who ordered that the traffic should be conducted, and he is responsible for the damage caused by aggregate traffic. The proviso to the section is only applicable to the appellant, who was the only person who had any knowledge of what the amount would be,

(1) [1895] 1 Q. B. 448.
(2) (1880) 44 J. P. 347.
(3) (1885) 49 J. P. 709.
(4) [1892] 1 Q. B. 8.
(5) (1873) L. R. 9 C. P. 16.

and the only person who could make a composition with the authority. *Lapthorn* v. *Harvey* (1) is no authority in the present case, for it dealt only with excessive weight.

Channell, Q.C., in reply.

Cur. adv. vult.

1896. Dec. 17. LORD ESHER M.R. This is a case which came before the Court of Quarter Sessions, and in which the question was whether the appellant was bound to reimburse the money expended in consequence of damage done by extraordinary traffic. The Court of Quarter Sessions decided that the appellant was not liable; but on appeal the Divisional Court were of a contrary opinion. The special case stated at quarter sessions raises the question, what is the true construction of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, and what is its proper application to the facts of the present case?

It seems to me clear that the words of the section, "by whose order," cannot simply mean "for whose advantage," and that the word "order" cannot be confined to an order given to a servant who is bound to obey it. The explanation of the section must be sought within these extremes. The best that I can give is that the expression "the person by whose order such weight or traffic has been conducted," may comprise a person by whose determination and direction the traffic has been taken along the road. If, therefore, a person makes up his mind that materials sent to him shall go along a certain road, and makes a contract to that effect with a tradesman, the person who has made such a contract is the person by whose order—that is, by whose direction and determination—the traffic has been conducted along the road, and the mere fact that he has made a contract with a tradesman to do it for a certain price does not prevent his coming within the section. But supposing a person has land which he desires to let as building land, and makes a contract with a builder by which the latter is to build a certain number of houses, the user of the roads for the carriage of building material would be for the advantage of the owner,

(1) 49 J. P. 709.

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Lord Esher M.R.

but it would be the contractor who would determine what road should be used and what should be carried over any given road, and it is impossible to my mind to say that the traffic would be carried by the order or direction of the owner. It is impossible to exhaust the various cases that may arise; but when once the rule of construction has been laid down, the effect of it on a particular case will be a question of fact.

I have two other observations to make—one is, that although there may be extraordinary traffic along a road it may be in certain cases that no one is liable for the damage caused by it. For example, if the traffic is due to a number of persons going independently to a race-meeting those who established the race-course have nothing to do with that. They do not order or direct people to come along the road, and do not know how the people will come. Then each person who comes along the road does not cause extraordinary traffic on the road or injure it. In such a case neither the person who establishes the race-course nor the people who come to it are liable.

Again, it may be that more than one person is liable. For instance, if a person contracts with another to bring certain things along a road and deliver them at a certain place, and a contractor accepts the contract and orders his people to carry the traffic along that road, in that case the person making the contract might be liable, and also the person who carries out the contract.

Taking the construction that I have indicated, it has to be applied to the facts of this special case. If the question who gave the order is dealt with as one of fact, that is as a question whether, within the construction I have placed on the section, an order was or was not given, the magistrates must determine that, and cannot ask this Court to do so. They have no right to ask this Court to draw an inference of fact; they must do that themselves. Here they have drawn an inference of fact, for they have found that the appellant was not the person by whose order the traffic was conducted. If it is a question of fact, they ought not to ask us whether it is right or wrong; but I think it would not be advisable in this case to treat the matter so strictly. The magistrates have found

certain facts, and what they ask us in effect is—whether there is anything in law which prevents their coming to the conclusion on these facts that the appellant was not liable; and I think the Court should give such an explanation of its views, not merely on the interpretation of the Act, but on its application to the facts, as may be a guide in future as well as a decision of the present case.

The state of things on the finding of the magistrates was this. The appellant made a contract with a man named Tabrett for the supply of materials of certain kinds inclusive of delivery, and it is clear beyond all doubt that Tabrett was not a servant of the appellant, but a person entering into a contract with him. The appellant knew that the delivery would, in fact, be conducted by traction-engines. There is no finding as to what the various roads in the neighbourhood were, but it is obvious that the persons who were to send materials might send them from any point of the compass. It is impossible to say that the appellant by any specific order, or by his contracts, determined the road by which the materials were to come. Some of them might come by the road in question and others by other roads, and the appellant deliberately declined to have anything to do with the place from which the materials were to be brought. The contractor in each case was to determine whether he would bring the materials from Faversham, or whether he would bring them from some other place in the opposite direction or in any direction.

Under these circumstances it seems to me that the magistrates were right in holding that there was no determination or decision by the appellant that the traffic in question should come along the road in question; and if so, it was not by his will or by anything that he did that the traffic was conducted along this road.

In my opinion the magistrates in quarter sessions were right, and the appeal from the judgment of the Divisional Court should be allowed.

LOPES L.J. read the following judgment:—I have not arrived at the same conclusion as the rest of the Court in this

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Lopes L.J.

case. The question upon which the opinion of the Court is asked is: Whether, having regard to the findings following, the justices in quarter sessions were right in law in holding that the appellant was not a person by whose order the extraordinary traffic caused by the carriage of the materials ordered for the works at Eastwell Park was conducted.

The justices were of opinion that the traffic caused by the carriage of materials, for the works carried out for Lord Gerard under the superintendence of one Kavanagh, was extraordinary traffic, and they found that such traffic had done damage to the road, and assessed the amount of such damage at 750*l*.

They found that, as regards such work, Kavanagh was not a contractor, but a servant of Lord Gerard.

They found as facts that the materials ordered for the work were all ordered upon the terms of their being delivered at the park at prices which included delivery, and that neither Lord Gerard nor Kavanagh directed, or had any control over, the mode of carriage of such materials, but that they knew that the delivery would, in fact, be conducted by traction-engines.

They held on these findings that neither Lord Gerard nor Kavanagh was a person by whose order the traffic was conducted, and that neither was liable for what was done by the persons who actually conducted such traffic.

The question is an important one. We are bound by the facts as found by the justices, but by s. 2 of the Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), in appeals like the present, power is given to the Court hearing the appeal to draw any reasonable inference of fact which might have been drawn by the Court of Quarter Sessions. I infer from the facts stated that Lord Gerard knew that the materials in question would be brought by the nearest and most convenient road, and that the nearest and most convenient road was the one in respect of which the present claim is made against him.

The Court below reversed the decision of the Court of Quarter Sessions, and held that Lord Gerard was the person liable.

In the years 1893 and 1894 Lord Gerard, the owner of a

mansion-house and park known as Eastwell Park, was carrying on building operations on an extensive scale. A portion of the works was done by independent contractors; but, besides such works, a considerable amount of work in the park was done by Lord Gerard himself, under the superintendence of Kavanagh, who in superintending the work was acting as a servant to Lord Gerard, and was paid a commission by Lord Gerard on the amount expended. Before any materials were ordered samples were submitted and approved by Lord Gerard, and when a sample was approved the person proposing to supply the materials was asked to give a price for it, such price in every case being an inclusive price for the material delivered free at Eastwell Park. It was left to the person supplying the materials to bring them to Eastwell Park in any way he thought fit.

The case may be illustrated thus. A person who is proposing to build a large mansion himself, without employing any architect or contractor, orders from a large number of different tradesmen the materials requisite for the work, the materials to be delivered at a price inclusive of carriage, and the tradesmen to be at liberty to deliver the materials in any way they think best. The different tradesmen deliver the materials, and in so doing cause damage to the roads by conducting excessive weight or extraordinary traffic along the same. In such circumstances can it be said that such damage is not caused by the order of the person who is building the house? Is he not the person by whose order such excessive weight or extraordinary traffic has been conducted over the roads in question?

It is not the case of an independent contractor who undertakes the works and who has everything under his control, over whom the building owner can exercise no dominion. About such a case I express no opinion, though I think there is much to be said in favour of the view taken by Wills J., of the case of such independent contractor, in the Court below. The case of *Lapthorn* v. *Harvey* (1) was the case of an independent contractor, and does not govern this case.

In *Williams* v. *Davies* (2) a different view seems to have been

(1) 49 J. P. 709. (2) 44 J. P. 347.

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taken from that taken in *Lapthorn* v. *Harvey* (1), as to the person liable when there was a contract for the carriage of goods. There Williams purchased certain timber near a railway station, and contracted with one Davies for the carriage of a portion of the timber. No particular route was prescribed, nor any particular mode of carriage. Davies duly performed his part of the contract with Williams, and was duly paid therefor. The highway was greatly damaged, and Williams was summoned for the extraordinary expenses incurred in consequence. The justices made an order against Williams, and the Court (Lush and Bowen JJ.) upheld the order. Lush J. said: "As to the person who causes the extraordinary traffic, I think it is of no consequence whether the purchaser of the timber causes it by his own waggons or those of his contractor, hired by the day or for longer periods, for it is equally by his order." This view, however, of the effect of the section was dissented from by Lord Coleridge C.J. and Mathew J. in *Lapthorn* v. *Harvey*. (1)

In *Reg.* v. *Ellis* (2) a farmer purchased about sixty tons of manure at a place about four miles distant from his farm. His foreman employed the appellants, who were proprietors of traction-engines and waggons, to cart the manure to his master's farm at the rate of 9*d.* per ton. The foreman pointed out to the appellants the place where the manure was to be deposited, but no further directions were given as to the mode in which it was to be conveyed. It was in evidence that the foreman employed the appellants knowing that they owned traction-engines and would be likely to use them in carting the manure, and because there was no other way of getting it carried within the necessary time. The road was the only road by which the spot indicated by the foreman for the deposit of the manure could be reached. The manure was conveyed by the appellants' engines and trucks, and damage was done to the highway. The appellants were held by the justices to be the persons "by whose order" the traffic had been conducted; and the Divisional Court thought there was sufficient evidence to justify this finding.

(1) 49 J. P. 709.

(2) (1882) 8 Q. B. D. 466.

There was a special finding in the case that the traffic was conducted by the order of the appellants. As to the first question raised by the case, namely, whether the sessions were right in holding that the appellants were the persons by whose order the traffic was conducted, all Field J. says is that there was sufficient evidence that the traffic was conducted by order of the appellants. The question of the proper construction of the words of the Act of Parliament seems to have been scarcely argued, and not dealt with in the judgment except as I have stated. I cannot think this case an authority of much weight, and if it means what is suggested I do not agree with it. It appears to me that the materials in question in this case were conducted by the order of Lord Gerard. If it had not been for the orders he gave to the persons who supplied the materials, this material would never have passed over the road. They were persons merely employed to bring the material, and were consequently put in motion solely by the order of Lord Gerard. All those persons had done was simply to quote a price at which they were prepared to deliver materials, and then Lord Gerard, knowing that they had quoted that price, and that they meant to deliver by traction-engine and by the nearest and most convenient road, said, "Send me the materials." The sole and effective cause of these materials passing over the road was the order of Lord Gerard.

Is it to be said, if I order a truck of coals from a coal merchant, and his waggons, owing to the excessive weight of the coals, do damage, that the damage is to be attributed to the order given to his carter by the coal merchant, and not to my order, which is the effective cause of any action being taken by anybody?

Take the illustration I suggested of a person himself without any contractor building a house in his park. He buys the different materials necessary for its construction from twenty different tradesmen, and the materials in the aggregate by their excessive weight cause damage to a road. It is impossible to say what particular portion of the materials caused the damage, or by whom that portion was carried; but it was all ordered by the person building the house. In such a case, if the contention of Lord Gerard is right, the highway authority would

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be powerless, and would have to look to twenty different persons without the means of discovering which was the offender. The object the Legislature had in view was to enable the highway authority to recoup the excessive expenditure not unfrequently occasioned by extraordinary and exceptionally heavy traffic, arising from building and similar operations of a temporary kind and from other causes, by which the road accommodation, provided for all alike at the public expense, is sometimes abused by individuals for their private purposes.

The Legislature surely must have intended the person who by his initial order brought the excessive weight on the road to bear the burden of the damage, and not those who simply obeyed and acted in conformity with the order. I read "by whose order" as if it were "in consequence of whose order."

This seems to have been the opinion of Lush and Bowen JJ. in *Williams* v. *Davies* (1), it is the opinion of Cave and Wills JJ. in the Court below, and it is the view which I take of the meaning of the words "by whose order such weight or traffic has been conducted" as applied to the circumstances of this case. I think the appeal should be dismissed.

RIGBY L.J. read the following judgment:—This is an appeal from a decision of the Divisional Court as to the proper answer to be given to a question submitted for the opinion of the High Court by a special case stated by a Court of Quarter Sessions.

The question was whether, having regard to the findings in the case, the justices in quarter sessions were right in law in holding that Lord Gerard was not a person by whose order certain extraordinary traffic was caused by the carriage of the material ordered for works carried on by him at Eastwell Park. The traffic is to be taken to be extraordinary traffic within the meaning of the Highways and Locomotives Amendment Act, 1878, s. 23, and no question arises as to the amount to be paid by Lord Gerard if he is a person by whose order the traffic was conducted.

The traffic treated as extraordinary traffic consisted in the carriage by traction-engine over part of the Faversham and

(1) 44 J. P. 347.

Ashford main road to Eastwell Park of materials to be used upon works being done by Lord Gerard in his park there under the superintendence of one Kavanagh, who is to be treated for the purposes of this case as the agent of Lord Gerard.

If Lord Gerard had not wanted the material for the works that he was carrying on, the extraordinary traffic would not have been conducted, and he of course shared in the advantage derived from it, though the persons supplying the material and the traction-engine owners also had their shares.

It is clear however, both on authority and on the words of the Act, that the mere fact of a person deriving advantage from the extraordinary traffic is not sufficient to fix him with liability for the expenses. There was nothing illegal in the extraordinary traffic, and Lord Gerard cannot be held liable unless it was conducted by his order within the meaning of s. 23 of the Act of 1878.

To make that section applicable there must be, first, extraordinary traffic and expenses occasioned thereby, and, secondly, some person by whom, in some reasonable sense of the words, the extraordinary traffic has been ordered to be conducted. If there be no such person, as, for instance, where the extraordinary traffic is made up of single loads of no excessive weight, brought upon the roads by separate and independent people, the result would be that no persons could be separately chargeable, and the expense of repairing the roads must fall as it would have done if the section had not been passed.

The question then being whether the traffic was conducted by Lord Gerard's order, it is material to observe that in the case, and in the judgments of the Divisional Courts, the word "order" is used in a sense which if not examined into may occasion some ambiguity.

The learned judges in the Divisional Court may have been, and for myself I think they were, right in the conclusion at which they arrived, that there was not as to any of the materials any contract by Lord Gerard to take, or by any person to supply, before the giving of what are called "orders" to deliver at Eastwell Park. In this view the so-called "orders" are in law nothing more than offers to accept at a

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price provisionally arranged, and when delivered at Eastwell Park, the quantities of materials therein mentioned, if found to be according to samples previously exhibited, and no person was by contract or otherwise under any legal obligation to obey any of the so-called orders. Whenever they were acted upon, the persons to whom they were addressed found it to their interest to accept and act upon them.

Assuming that traffic might, in a reasonable sense, be said to have been ordered to be conducted by the person who wanted the materials, if he gave directions for their being brought from one specified place to another, there is nothing like that in the present case. No one of the offers made by Lord Gerard specified any place from which the materials were to come, or the road by which they were to be brought. If the materials were according to sample, it was a matter of indifference to Lord Gerard from what place or by what route they arrived at Eastwell Park, and he would not have been at liberty to refuse acceptance by reason of the place from which, or the road by which, they were brought.

Until the materials were delivered at Eastwell Park, and accepted as being according to sample, the property did not vest in Lord Gerard. If any materials had been rejected, as not being according to sample, Lord Gerard could not have been held responsible for their carriage to and from Eastwell Park.

He had nothing in law to do with the owners of the traction-engines, who entered into their own contracts for the carriage of the materials to be tendered at Eastwell Park with the owners of them quite independently of Lord Gerard.

It is, however, found in the case that Lord Gerard knew that the materials would be delivered by traction-engine, and it is also found that it would not have been practicable to deliver in any other manner at the prices named. It is not found, nor can it be reasonably inferred from the actual finding, that he knew from what place or by what road the materials would be delivered. The case itself shews that there was at least one road other than that in question by which some materials were, and others might have been, delivered at Eastwell Park.

In *Lapthorn* v. *Harvey* (1) Lord Coleridge C.J. and Mathew J., sitting as a Divisional Court, held that a person who had contracted with a sub-contractor for the carriage of stone, leaving him to carry it as he pleased, was not liable for his having, by employing traction-engines, conducted extraordinary traffic and occasioned damage within the meaning of the Act.

It seems to me that this case can only be distinguished from the present in any way that might be unfavourable to Lord Gerard by the circumstance that there was one contract carrying the whole of the traffic, and that there was nothing in that contract from which it could be inferred that haulage by traction-engine was at the date of it in the contemplation of the parties sought to be made liable. On the other hand, the materials carried were the property of the persons sought to be made liable, who themselves contracted for the carriage of them; so that their connection with the carriage was closer there than that of Lord Gerard in the present case.

In the later case of *Hobbs* v. *Tunbridge Local Board* (2), heard before a court of petty sessions, the facts were substantially the same as in *Lapthorn* v. *Harvey* (1), except that the firm who contracted for the haulage were owners of traction-engines. There does not appear to have been any finding that the local board knew that traction-engines would be used. Lord Bramwell, however (who happened to be the chairman of the sessions), in dealing with the case refers to both these points in such a way as to make it reasonably clear that no such findings would have changed his view as to the applicability of the section.

This decision was of course in no way binding on the Divisional Court, and cannot indeed be cited as an authority, or as having more weight than an extrajudicial opinion of an eminent judge. It was not referred to in the judgments of the learned judges; but, if the reasoning is sound, it is very important for the decision of the present case. It seems to lay down that to contract for the carriage of heavy materials with traction-engine owners not specifying or requiring that traction-engines shall be used is not to give an order for conducting the

(1) 49 J. P. 709. (2) (1885) 49 J. P. 679.

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traffic within the meaning of the Act, though both parties to the contract might know well enough that traction-engines would in all probability be used.

The learned judges in the Court below seem to have thought that the principle of *Lapthorn* v. *Harvey* (1) is only applicable where the traffic is conducted for the performance of a pre-existing contract. But I am unable to see how the legal position of a person who by making one general contract gives occasion for the extraordinary traffic can be better than that of one who gives a series of invitations to others for the delivery of materials the carriage of which in the aggregate constitutes the extraordinary traffic.

The case of *Williams* v. *Davies* (2), as reported, does not in my judgment afford any rule applicable to the present case. From the case there stated it appears that the defendants contracted with Davies (who happened to be the surveyor of the highway board) for the carriage of a portion of the timber at a certain rate per foot of timber; that in pursuance of the contract Davies, with his own carriages and horses, hauled a portion of the timber, and the defendants paid him the agreed price for the work done by him; that the defendants with their own carriages and horses hauled the remaining portion; that the total quantity of timber hauled was sixty-seven loads, but that no evidence was given or tendered as to how much was hauled by Davies and by the defendants respectively. Davies, by his certificate, certified that the defendants conveyed the timber with their horses and carriages and by horses and carriages hired by them for the conveyance of such timber. The main question appears to have been whether or no the conveyance of the sixty-seven loads was extraordinary traffic.

The judgment was delivered by Lush J., and the only passage in the judgment which touches the present question is the following: "As to the person who causes the extraordinary traffic, I think it is of no consequence whether the purchaser of the timber causes it by his own waggons, or by those of his contractor, hired by the day or for longer periods, for it is equally by his order."

(1) 49 J. P. 709. (2) 44 J. P. 347.

From this it would seem that the Court took the view expressed in the surveyor's certificate, that the contract amounted to a hiring of the waggons—in which case the conclusion would be undoubtedly right.

Whether this was the correct inference from the facts stated may be doubtful; but at any rate the judgment lays down no rule of law applicable to the present case. Here it is clear that Lord Gerard did not hire the traction-engines or any of them.

In *Reg.* v. *Ellis* (1) material was carried from one fixed place to another, and there was only one road by which this could be carried.

The conclusion seems to be that on the balance of authority, as well as on the construction of the Act apart from authority, Lord Gerard did not do anything which could in law amount to an order for conducting this traffic, or any part of it, and cannot therefore be held liable in respect of it.

Appeal allowed.

Solicitors for appellant: *Meynell & Pemberton.*

Solicitors for respondents: *Prior, Church & Adams, for Warner & Turner, Maidstone.*

(1) 8 Q. B. D. 466.

A. M.

C. A.
1897
June 15.

[IN THE COURT OF APPEAL.]

DOMBEY & SON, LIMITED *v.* PLAYFAIR BROTHERS AND OTHERS.

Practice—Application for Judgment—Dismissal—Renewal of Application—Order XIV., *r.* 1.

Where, on an application to enter final judgment under Order XIV., r. 1, unconditional leave to defend has been given in consequence of a technical defect in the writ, the plaintiff may, after the defect has been cured, make a second application for final judgment.

APPEAL from an order of a judge at chambers.

The action was on a bill of exchange drawn on and accepted by Playfair Brothers, under which style two persons, Lowles and Westoby, carried on business. The action was brought against Lowles and Westoby by name, and judgment by default was obtained against Westoby, and an application was made under Order XIV., r. 1, to enter judgment against Lowles, who obtained unconditional leave to defend.

The master in making this order did not deal with the merits of the case, but was of opinion that the action should have been brought against the firm in the firm name. The plaintiffs added the firm name, Playfair Brothers, to the writ, and again applied under Order XIV., r. 1, for judgment. The master before whom this summons came gave Lowles leave to defend only on payment of the sum claimed into court, and this order was confirmed by Lawrance J.

The defendant Lowles appealed.

W. Graham, for the defendant Lowles. The plaintiff had no right to renew the application under Order XIV., r. 1. Where unconditional leave to defend has been given there is no appeal: Judicature Act, 1894, s. 1, sub-s. 3; and this shews that an order to that effect is final and cannot be reviewed by any process. It is not material whether the order was made on technical

grounds or not; and this has been decided in two cases in the Irish Courts: *Kiely* v. *Massey* (1) and *Trench* v. *Mulcahy*. (2)

It appears that Mathew J. and Pollock B. have refused to follow these cases; and the Divisional Court in *Sykes Brewery Co.* v. *Chadwick* (3) confirmed the order of Pollock B. The Court, however, refused to decide whether if there had been an adjudication a second application might be made. In the present case there was an adjudication, and it is submitted that it was an adjudication on the merits. [He then contended on the facts that there was a defence.]

T. Willes Chitty, for the plaintiffs. It is plain that unconditional leave to appeal was given in the first instance on the technical ground that the firm name should have appeared on the writ. Whether the master was right or wrong, the defect, if there was one, has been amended, and there is nothing to prevent a renewal of the application under Order XIV., r. 1.

W. Graham, in reply.

LORD ESHER M.R. This is an action on a bill of exchange drawn on a firm and accepted in the firm name. An application is made under Order XIV., r. 1, for final judgment, and a master and judge have given conditional leave to defend. It is said, however, that a master had previously made an order giving unconditional leave to defend, and that the matter is res judicata and cannot be reopened. This argument appears to me to be untenable, for the matter adjudicated on is not the action, but merely a step in the action. The defence suggested is an equitable defence; but it is of too shadowy a description to allow of its being raised except on terms. I think, therefore, that we ought not to interfere with this order.

LOPES L.J. I have no doubt that on the first application unconditional leave to defend was given on a technical objection, and that there was nothing like a judicial decision on the case. On the second application the technical defect had been remedied, and leave to defend was given only on the terms that

(1) (1880) 6 L. R. Ir. 445. (2) (1881) 8 L. R. Ir. 146.
(3) (1891) 7 T. L. R. 258.

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money should be paid into court. The suggested defence on equitable grounds is of so unsubstantial a character that I think the order made meets the justice of the case, and ought not to be interfered with.

Appeal dismissed.

Solicitors for plaintiffs: *Learoyd, James & Mellor.*
Solicitors for defendants: *Bonner, Thompson, Burnie & Co.*

A. M.

1897 *Jan.* 19.

THE QUEEN *v.* THE CLERK OF ASSIZE OF THE OXFORD CIRCUIT.

Criminal Law—Pleading—Coroner's Inquisition—Sufficiency of.

A coroner's inquisition stated that the cause of the death of the deceased was injury resulting from a fall into a quarry, and that "by the neglect of" (three named persons) "to fence or cause to be fenced the said quarry the said" (deceased) "fell therein, and that therefore the said" (three persons) "did feloniously kill" the deceased:—

Held, that, as the inquisition qualified the finding of manslaughter by a statement of the ground of the finding, and that statement shewed no legal ground for it, the inquisition was bad on the face of it, and might be quashed.

RULE for a certiorari to bring up a coroner's inquisition to be quashed.

An inquisition taken before E. M. Grace, one of the coroners for the county of Gloucestershire, as to the cause of the death of one George Seabourne, stated that the jury "upon their oaths do say that the said George Seabourne was found dead on December 26, 1896, at a quarry at Stapleton in the county of Gloucester and that the cause of his death was injuries to his head and back caused by a fall into a quarry and so do further say that by the neglect of Edward Tuckett Daniell, Thomas Free, and Alfred John Saise to fence or cause to be fenced the said quarry George Seabourne fell therein, and that therefore the said Edward Tuckett Daniell, Thomas Free, and Alfred John Saise did feloniously kill the said George Seabourne."

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It appeared from the depositions that Thomas Free mentioned in the inquisition was the managing director of a stone quarry company which owned the quarry in question, and that E. T. Daniell and A. J. Saise were respectively the chairman of and the inspector of nuisances for the Stapleton Urban District Council, within whose district the said quarry was situate. It also appeared that there was a road running along the edge of the quarry above the place where the deceased was found, and that the quarry at that point was not properly fenced, and had been in that condition for some years.

The inquisition having been lodged with the Clerk of Assize of the Oxford Circuit, a rule nisi was obtained for a certiorari directed to the said Clerk of Assize to bring up the inquisition to be quashed on the ground that it was bad in law on the face of it, and did not disclose any offence on the part of the persons named therein.

A. Lyttelton, for the coroner, shewed cause. The inquisition in stating that the three defendants did feloniously kill the deceased sufficiently charges them with manslaughter. The introductory part of the finding may be rejected as surplusage. But even if it is bad in form the Court will not quash it, for the depositions shew what the position of the respective defendants was, and that it was owing to their breaches of duty that the death occurred. The quarry adjoined a highway, and being insufficiently fenced was a public nuisance: 50 & 51 Vict. c. 19. Free, as the manager of the quarry, was the person on whom the duty to fence it primarily lay, and the other two defendants were under an obligation to see that Free's duty was properly discharged. Their negligent omission to discharge their duty amounted to manslaughter: *Reg.* v. *Hughes*. (1) In *Reg.* v. *Pocock* (2) trustees appointed under an Act for the purpose of repairing certain roads were indeed held not chargeable with manslaughter for the accidental death of a passenger in consequence of one of the roads being out of repair through their neglect; but there the neglect complained of was not the immediate cause of the accident. At any rate, there is a good

(1) (1857) 26 L. J. (M.C.) 202. (2) (1851) 17 Q. B. 34.

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ground for a charge of manslaughter against Free if not against the other defendants.

Danckwerts, for the defendants Daniell and Saise. This inquisition would clearly have been bad at common law, for at common law it was necessary to set out all the facts from which the alleged duty arose. Then s. 6 of 24 & 25 Vict. c. 100, which in *Reg.* v. *Ingham* (1) was held to apply to a coroner's inquisition, provided a short statutory form of pleading. But if the coroner does not choose to follow that form, he must draw his inquisition in such form as to satisfy the old common law rule. The inquisition, therefore, is bad on the face of it; and as the case of *Reg.* v. *Pocock* (2) is a distinct authority that persons in the position of Messrs. Daniell and Saise are not chargeable with manslaughter for such an accident as this, the inquisition ought to be quashed.

Gwynne James, for the defendant Free.

H. Sutton, for the Public Prosecutor.

WRIGHT J. I think this inquisition should be quashed. If it had simply found that the three defendants did feloniously kill and slay the deceased person, that would clearly have been enough; but I think it is a general rule of criminal pleading, that although the simple statutory form of indictment or inquisition will suffice, yet if the prosecutor chooses to resort to a special form and condescend to particulars, he must state material facts sufficient to support a conviction. This distinction is but rarely material, owing to the large power of amendment which the judge now possesses; but, unless amendment be made, insufficiency of statement in an inquisition in special form will be fatal on demurrer. Suppose that here the jury were at the trial to find a special verdict shewing no more than this inquisition, the verdict would obviously be bad. That seems to me a fair test to apply, although the question would not be exactly the same. There is no common law duty to fence a quarry which is not stated to be so situate as to be a public nuisance. There is no statutory duty to fence it unless it is within a certain distance of a high-

(1) (1864) 5 B. & S. 257. (2) 17 Q. B. 34.

way; and there is no allegation that the defendants or any of them had any such relation to the quarry as to impose on them a personal liability to fence. Then there is no doubt that we have power to quash this inquisition, the case of *Reg.* v. *Directors of Great Western Ry. Co.* (1) having decided that the jurisdiction of the Queen's Bench Division in that respect is left untouched by s. 20 of the Coroners Act, 1887. If, indeed, the objection to the inquisition had been purely formal and had no substance in it, we should probably have refused to exercise our power, and have left the matter to be dealt with by the judge at the assizes. But here, as regards two of the defendants, the objection is most substantial. It cannot for a moment be contended that members of a district council or other similar body are liable to a charge of manslaughter because they have omitted to exercise powers vested in them to cause some other person to discharge his duty of fencing; and under those circumstances it would be an injustice to make Messrs. Daniell and Saise appear at the assizes and stand their trial. Even as regards the third defendant, Mr. Free, we cannot say that there is no substance in the objection, and therefore think it better to quash the inquisition as against him also, though at the same time we do not say that in his case the matter is equally clear, and we do not wish in any way to prejudice the Public Prosecutor, if he thinks fit to institute further proceedings against Mr. Free.

BRUCE J. I am of the same opinion. It is quite true that the inquisition contains words which, if they stood alone, would have been a good inquisition; but those words cannot be separated from the words which precede them, connected as they are by the important word "therefore." The inquisition professes to shew the particular facts under which the duty to fence or cause to be fenced arose, and then says that because that duty was not performed the defendants were guilty of a felonious act; but it wholly omits to set out any facts from which such a duty as that alleged would arise. Where an inquisition condescends to particulars, and those particulars

(1) (1888) 20 Q. B. D. 410.

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Bruce J.

are insufficient to disclose a legal duty, it may be quashed as being bad on the face of it. With reference to the case of the manager of the quarry, I only wish to add this—that it is a general rule of law that a person is not to be held criminally responsible for the neglect of a subordinate, and consequently, although it should be proved that there was a neglect to fence the quarry, yet if the manager of the quarry could establish that it was not his neglect but the neglect of a subordinate, he would have a complete answer to the charge.

Rule absolute.

Solicitors for coroner: *Bridges, Sawtell & Co.*

Solicitors for defendants Daniell and Saise: *Rowcliffes & Rawle, for Benson, Carpenter & Co., Bristol.*

Solicitors for defendant Free: *Rowcliffes & Rawle, for Salisbury & Griffiths, Bristol.*

Solicitor for Public Prosecutor: *Solicitor to the Treasury.*

J. F. C.

C. A.

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Jan. 29.

[IN THE COURT OF APPEAL.]

JONES *v.* GERMAN.

Justices—Information—Sufficiency of Information—Allegation of reasonable Suspicion of Larceny—Specification of Goods alleged to be Stolen—Search-warrant—Legality of Warrant.

A search-warrant may be issued on an allegation of reasonable suspicion of larceny.

On an application to a justice of the peace for a search-warrant, the sworn information upon which the application was made stated that the informant "hath just and reasonable cause to suspect and doth suspect that W. J. has in his possession certain property belonging to" (the informant), "and that he has requested the said W. J. to allow him to search several boxes which the said W. J. has had packed ready to be taken away, and which he refuses to be looked through." The justice issued his warrant, which was executed. In an action of trespass alleging that the information was insufficient, and that the warrant was consequently illegal and without jurisdiction:—

Held, affirming the judgment of the Lord Chief Justice, that it is not necessary in such an information to allege that a larceny has in fact been committed, but that it is enough to allege a suspicion that a larceny has

been committed; that it is not necessary to specify in the information the particular goods for which a search is desired; that the information in question substantially averred that the informant suspected certain property of his to have been stolen; and that it was sufficient to give the justice jurisdiction.

APPEAL from a judgment of Lord Russell of Killowen C.J. on further consideration, reported [1896] 2 Q. B. 418.

The action was against the defendant, a justice of the peace, for trespass to goods and for false imprisonment, and the question was as to the sufficiency of a sworn information made by one Wood, in whose employment the plaintiff was as butler, on an application to the defendant for a search-warrant. The information was in the following form: "Be it remembered that . . . . Thomas Wood . . . . on oath maketh complaint that he hath just and reasonable cause to suspect and doth suspect that William Jones of Brasted has in his possession certain property belonging to the said Thomas Wood, and upon his oath doth depose and say that the said William Jones has been in his employ for five years and is now under notice to quit, and that he has requested the said William Jones to allow him to search several boxes which he the said William Jones has had packed ready to be taken away, but which he refuses to be looked through." The defendant upon this information issued his warrant to a constable authorizing him in the usual form to enter the premises occupied by William Jones and search for the goods, and ordering him, if the same or any part thereof should be found on such search, to bring the goods so found and also the body of William Jones before some justice of the county to be dealt with according to law. The constable accordingly made a search in the plaintiff's boxes in the presence of Wood, who identified a number of articles as his property. The constable then arrested the plaintiff on a charge of stealing the articles so identified; and the plaintiff was eventually committed for trial at the quarter sessions. In the course of the trial the prosecutor withdrew from the prosecution, and the plaintiff was discharged. This action was then brought on the allegation that the information upon which the search-warrant was issued was insufficient,

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and that the defendant in issuing the warrant acted illegally and without jurisdiction. The defendant pleaded that the warrant was good, both at common law and also under s. 103 of the Larceny Act, 1861 (24 & 25 Vict. c. 96). The jury assessed the damages conditionally, and the question of liability was reserved for further consideration. On the argument the Lord Chief Justice gave judgment for the defendant. (1)

The plaintiff appealed.

Lawson Walton, Q.C., and *A. Gill*, for the plaintiff, contended that the information was insufficient on the grounds that it did not contain any allegation that goods had been stolen, that there was no reference to specific goods, that the statement that goods were in the possession of the plaintiff was consistent with a claim to them on his part, and that the information did not even aver a suspicion on the part of the informant that goods had been stolen.

[They cited 4 Inst. 176; *Entick* v. *Carrington* (2); *M'Donald* v. *Bulwer* (3); *Lawrenson* v. *Hill* (4); *Lindsay* v. *Leigh*. (5)]

Carson, Q.C., and *Hohler*, for the defendant. There need not be an averment upon oath that goods have been stolen, but it is sufficient that the informant swears that he suspects that they have: *Elsee* v. *Smith*. (6) If the information alleges facts which by reasonable intendment convey a charge of felony the magistrate has jurisdiction: *Lawrenson* v. *Hill* (7); and the defendant would not be liable for a mere error of judgment: *Mills* v. *Collett*. (8)

Lawson Walton, Q.C., in reply.

LORD ESHER M.R. In this case an action has been brought against a magistrate for trespass to goods and wrongful imprisonment, and the plaintiff's case is that the information upon which the search-warrant was grounded was insufficient.

(1) [1896] 2 Q. B. 418.
(2) (1765) 2 Wils. 275; 19 Howell's State Trials, 1030, at p. 1067.
(3) (1862) 13 Ir. C. L. Rep. 549.
(4) (1860) 10 Ir. C. L. Rep. 177.
(5) (1848) 11 Q. B. 455.
(6) (1822) 1 D. & R. 97.
(7) 10 Ir. C. L. Rep. at p. 194.
(8) (1829) 6 Bing. 85, at p. 92.

The information was to the effect that the claimant had reasonable cause to suspect and did suspect that his servant had in his possession certain property belonging to the complainant; that the servant was under notice to quit and would not allow his boxes to be searched. The defendant thereupon issued his warrant to a constable to enter the premises and search for the goods, and if the same were found to apprehend the plaintiff. The constable accordingly made the search, and some things identified by the complainant as his were found. The plaintiff was thereupon arrested on the charge of stealing the goods, and was committed for trial; but at the trial the prosecutor withdrew from the prosecution, and the plaintiff was discharged.

The plaintiff brought this action, which was tried before the Lord Chief Justice, and alleged that the warrant was granted illegally and without jurisdiction. I agree with the Lord Chief Justice in thinking that there is enough on the face of the information to justify the magistrate in issuing the search-warrant, and I think the appeal must be dismissed.

LOPES L.J. The question arises in this case upon the form of the information upon which the defendant, who is a magistrate, issued a search-warrant to a constable to enter and search certain premises, and if goods were found to seize them and apprehend the plaintiff. It is said that on the information as sworn there was no jurisdiction to issue a search-warrant, because there was no allegation that a larceny had been committed, and because no goods are specified in the warrant. I think it is clear on the authorities that it is not necessary to allege an actual felony, but that it is enough to allege that there are reasonable grounds for suspecting that a felony has been committed. The decision in *Elsee* v. *Smith* (1) establishes that proposition. If so, we must look to the information in this case and see whether by reasonable intendment it may be gathered from it that the informant suspected that a felony had been committed in respect of property of his. Applying the test suggested by the Lord Chief Justice in his judgment, if

(1) 1 D. & R. 97.

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the language of the information were the subject of an action of libel, it would be properly capable of the innuendo that the informant had reasonable grounds for suspecting, and did suspect, that his goods were being feloniously dealt with. If this meaning ought to be attached to the information, it was a sufficient one, and one on which the magistrate had jurisdiction to act, although no specific goods are mentioned in it.

I agree that the judgment of the Lord Chief Justice should be upheld and the appeal dismissed.

LORD ESHER M.R. Rigby L.J., who heard the argument, concurs in this judgment.

Appeal dismissed.

Solicitor for plaintiff: *C. Everett.*

Solicitors for defendant: *Routh, Stacey & Castle, for Knocker, Knocker & Holcroft, Sevenoaks.*

A. M.

1897 *Jan.* 12, 15.

MORRIS, APPELLANT; HOWDEN, RESPONDENT.

Ship—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 320, 341, 342—*Offences—"Passage Broker."*

By s. 341 of the Merchant Shipping Act, 1894, a "passage broker" is defined as "any person who sells or lets, or agrees to sell or let, or is anywise concerned in the sale or letting of steerage passages in any ship proceeding from the British Islands to any place out of Europe not within the Mediterranean Sea"; and by s. 342, "a person shall not act directly or indirectly as a passage broker" unless he holds the prescribed licence:—

Held, that the selling or letting intended by s. 341 was a selling or letting in a named ship of a passage to commence at a definite time for a specified voyage, and, therefore, that a person who agreed to procure a passage for another, no ship or time of sailing being named or specified, had not "acted as a passage broker" within the meaning of s. 342.

The respondent, in consideration of 22*l.* paid to him by C., agreed to place C.'s son as a farm pupil in Canada, and out of the 22*l.* to procure him a steamship passage from Liverpool to Quebec. Subsequently the respondent obtained for about 9*l.* from shipowners a contract ticket for a voyage from Liverpool to Quebec, and sent it to the son. The respondent made no profit or commission out of the latter transaction:—

Held, that he had not been "concerned in the sale or letting of a passage" within the meaning of s. 341.

By s. 320, "if any person, except the Board of Trade and persons acting

for them and under their direct authority, receives money from any person for or in respect of" a passage by ship of one of the specified kinds, "he shall give to the person paying the same a contract ticket signed by or on behalf of the owner, master, or charterer of the ship":—

Held, that in order to bring a case within this section there must be a receipt of money paid for a specified passage, commencing at a fixed time, in a named ship.

CASE stated under the Summary Jurisdiction Acts by the stipendiary police magistrate for the city of Sheffield.

The appellant, being a person duly authorized in that behalf by the Board of Trade, preferred two informations against the respondent, alleging, in the first, that the respondent had unlawfully acted as a passage broker without being duly licensed, contrary to the provisions of s. 342 of the Merchant Shipping Act, 1894; and in the second, that he had unlawfully received money from a person in respect of a passage as a steerage passenger in a ship without giving such person a contract ticket signed by or on behalf of the owner, charterer, or master of the ship, and in the prescribed form, contrary to the provisions of s. 320. (1)

The following material facts were proved or admitted at the

(1) The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 341: "(1.) Any person who sells or lets or agrees to sell or let, or is anywise concerned in the sale or letting of steerage passages in any ship proceeding from the British Islands to any place out of Europe not within the Mediterranean Sea shall for the purposes of this part of this Act be a passage broker."

Sect. 342: "(1.) A person shall not act directly or indirectly as a passage broker unless he—

"(*b*) Holds a licence for the time being in force to act as passage broker."

"(5.) If any person fails to comply with any requirement of this section, he shall for each offence be liable to a fine not exceeding 50*l*."

Sect. 320: "(1.) If any person, except the Board of Trade and persons acting for them and under their direct authority, receives money from any person for or in respect of a passage as a steerage passenger in any ship, or of a passage as a cabin passenger in any emigrant ship, proceeding from the British Islands to any port out of Europe and not within the Mediterranean Sea, he shall give to the person paying the same a contract ticket signed by or on behalf of the owner, charterer, or master of the ship, and printed in plain and legible characters.

"(2.) The contract ticket shall be in a form approved by the Board of Trade and published in the *London Gazette*. . . .

"(3.) If any person fails to comply with any requirement of this section, he shall for each offence be liable to a fine not exceeding 50*l*."

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hearing of the informations before the magistrate, and were stated in the case.

The respondent was the secretary of an association for placing persons as farm pupils in Canada, and held no licence to act as a passage broker.

In May, 1896, the respondent agreed with J. Craven, in consideration of 22*l*., to place the latter's son, E. W. Craven, as a farm pupil in Western Ontario, Canada. The terms of the contract were contained in a receipt, dated May 12, 1896, given by the respondent to J. Craven on payment of the 22*l*., and were, so far as material, as follows:—

"Received from Mr. James Craven, of &c., the sum of 22*l*., the same being a premium for which we undertake to place his son, Mr. E. W. Craven, who is now seventeen years of age, as a farm pupil in Western Ontario, Canada, with a good farmer there, where he will be treated as one of the family, and have as comfortable home as farmers usually have, and be practically taught Canadian farming, receiving also his board and lodging, and in addition thereto pay in proportion to the value of his services. . . . It is distinctly understood that the above-named sum includes second class steamship passage from Liverpool to Quebec and second class rail to Thames Ville, together with the charges of this association for placing and for the after supervision of the said E. W. Craven."

On May 18 the respondent obtained, and forwarded to E. W. Craven, a contract ticket for a passage from Liverpool to Montreal viâ Quebec in the Allan Line steamship *Mongolian*. This ticket was duly signed on behalf of the owners of the ship, and was obtained from their agents, who were duly licensed passage brokers. The respondent paid to such agents for such ticket 8*l*. 18*s*. 11*d*. out of the 22*l*. paid to him by J. Craven. The respondent did not get any profit or commission whatsoever out of the 8*l*. 18*s*. 11*d*. paid by him as passage money. The passage was described in the contract ticket as "intermediate," but it was in fact a steerage passage.

The magistrate dismissed both informations.

The question for the opinion of the Court was whether, upon

the facts stated, the respondent was guilty of either of the offences with which he was charged.

Bonsey, for the appellant. On the facts stated in the case the magistrate ought to have convicted on both informations. Part of the consideration for which the 22*l.* was paid by J. Craven to the respondent was that the latter should render services by getting E. W. Craven a passage to Quebec. It does not appear how much of the 22*l.* was taken as profit by the respondent, but some of it was his profit, and he therefore brought himself within the definition of "passage broker" in s. 341 as being concerned in the sale of a steerage passage. He also acted in contravention of s. 320 by taking the 22*l.* from J. Craven without giving him at that time a proper contract ticket.

No counsel appeared for the respondent.

Cur. adv. vult.

Jan. 15. The following judgment was read by

BRUCE J. The principal question in this case is whether the respondent, Howden, acted directly or indirectly as a passage broker within the meaning of s. 342 of the Merchant Shipping Act, 1894. The meaning of "passage broker" is to be ascertained by reference to s. 341, which defines a passage broker to be "any person who sells or lets or agrees to sell or let, or is anywise concerned in the sale or letting of steerage passages in any ship proceeding from the British Islands to any place out of Europe not within the Mediterranean Sea." Looking at the other sections of the statute bearing upon this matter, and to the forms contained in the schedule to the Act relating to passage brokers and to steerage passengers, I think that the Act referred to means a selling or letting in a named ship of a passage to commence at a definite time for a specified voyage. I am, therefore, of opinion that the agreement entered into on May 12, of which the written receipt of that date signed by the defendant is evidence, was not an agreement for selling or letting a passage within the meaning of s. 341. The defendant

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Bruce J.

undertook for the sum of 22*l.* to place Ernest William Craven as a farm pupil in Western Ontario, and out of the 22*l.* to procure for him a second-class steamship passage by sea from Liverpool to Quebec, and a passage by rail to Thamesville. That was, I think, an agreement to procure him a passage at some convenient time in some fitting ship from Liverpool to Quebec; but it was not a selling or letting, or an agreement to sell or let a passage at a definite time in a named ship; and although the passage ultimately obtained was a steerage passage, I am not at all sure that there is anything in the letter of May 6, or in the receipt of May 12, to shew that the "intermediate" passage, or the "second class" steamship passage, mentioned in those documents, referred to a steerage passage within the meaning of s. 341 of the Merchant Shipping Act.

On May 18 the defendant seems to have received information that E. W. Craven was ready to leave at once; and apparently on the same day the defendant obtained from Mr. Robinson, who acted as agent for Messrs. Cook & Sons and for Messrs. Allan, a passenger contract ticket for a passage for E. W. Craven on board Messrs. Allan's steamship *Mongolian*, from Liverpool to Montreal viâ Quebec. Messrs. Cook & Sons were duly qualified as passage brokers, and Mr. Robinson was duly appointed as their agent. This ticket was forwarded to E. W. Craven on the same May 18. E. W. Craven, therefore, received a contract ticket, made out in due form, signed by the authorized agent of Messrs. Cook & Sons, which conferred upon him all the advantages which the Merchant Shipping Act has provided for the security of steerage passengers. But it is said that this contract ticket was a letting or selling of a steerage passage in a ship within s. 341, and that the defendant was concerned in the selling or letting. No doubt he procured the ticket, and paid 8*l.* 18*s.* 11*d.* for it out of the 22*l.* mentioned in the receipt of May 12; but the defendant made no profit out of the ticket, and received no commission from the shipowners or from the passage brokers. So far as the act of the defendant was concerned, it seems to me that what he did was to purchase, as agent for James Craven, a ticket for a passage for E. W. Craven. I think it must be conceded that a person, who as a

mere act of friendship paid for and procured a passenger ticket for another, could not be said to be concerned in the contract of sale or letting contained in the passenger ticket. To be concerned in a sale or letting means, I think, to have a part or share in the sale or letting—to have something to do with the sale or letting—to have some interest in the transaction, or in some way to derive some profit or advantage from it. If the father, James Craven, had purchased of Messrs. Cook & Son through their authorized agent a ticket for his son, E. W. Craven, he would not, I think, have been guilty of any breach of the provisions of the 341st section; and as regards the act of the purchase of the ticket, I cannot see upon what principle it is possible to distinguish between a purchase of a ticket by a father for a son and the purchase made by the defendant. In *Todd* v. *Robinson* (1) the Court of Appeal seems to have thought that a person might be interested in a contract and yet not concerned in it. In the present case the defendant seems to have been a passive agent, paying on behalf of Craven for the ticket and forwarding it to him. It is said that the defendant, or those on whose behalf he acted, made a profit out of the 22*l.*; but we are dealing only with the 8*l.* 18*s.* 11*d.* paid for passage money, and out of that there was no profit. It seems to me that it would be straining the language of s. 341 to hold that the defendant was concerned in the sale or letting of the passage. I therefore think that the learned magistrate was right in refusing to convict of an offence under s. 342.

I also think that the magistrate was right in refusing to convict under s. 320. The defendant did give to Craven a contract ticket duly signed on behalf of the owners of the ship. But, further, I am not satisfied that he received money from Craven for or in respect of a passage in any ship within the meaning of s. 320. It seems to me to be clear that this section must mean a receipt of money paid for a specified passage commencing at a fixed time in a named ship. The 22*l.* which the defendant received was not paid to him in respect of a passage in any named ship, and it would have been impossible for the defendant, at the time he received the 22*l.*,

(1) (1884) 14 Q. B. D. 739.

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to have procured a contract ticket such as is mentioned in s. 320.

WRIGHT J. I am of the same opinion.

Judgment for the respondent.

Solicitor for appellant: *Solicitor of the Board of Trade.*

W. A.

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Nov. 11; *Dec.* 11.

PEEBLES *v.* THE OSWALDTWISTLE URBAN DISTRICT COUNCIL.

Local Government—Sewers—Duty to make Sewers—Duty to afford Facilities for Factories to drain into Sewers—Remedy for Default—Mandamus—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 21, 299—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 7, 10.

The duty of a local authority under s. 15 of the Public Health Act, 1875, to make such sewers as may be necessary for draining their district for the purposes of the Act extends to the making of sewers sufficient not merely to carry off the ordinary sewage, but also the effluents from the manufactories in the district, provided they are not injurious to health. This obligation may be enforced by mandamus, the remedy by an application under s. 299 to the Local Government Board not being exclusive nor a sufficient and appropriate remedy in the sense of constituting a bar to an application for a mandamus.

The High Court will not grant a mandamus to compel a local authority under s. 7 of the Rivers Pollution Prevention Act, 1876, to give facilities for enabling manufacturers to carry the liquids proceeding from their factories or manufacturing processes into the sewers, the remedy given by s. 10 of that Act of an application to the county court of the district being a sufficient and appropriate remedy.

ARGUMENT of points of law before Charles J.

The action had been originally brought by Philip Cadell Peebles, who died before the close of the pleadings; his executors were subsequently joined as plaintiffs, the cause of action having been held by the Court of Appeal to survive to them: see *Peebles* v. *Oswaldtwistle Urban District Council.* (1)

The statement of claim was as follows:—

1. By the Public Health Act, 1875, ss. 15 and 21, it is pro-

(1) [1896] 2 Q. B. 159.

vided that every local authority shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of that Act, and that the owner or occupier of any premises within the district of a local authority shall be entitled to cause his drain to empty into the sewers of that authority subject to certain conditions therein mentioned.

2. By the Rivers Pollution Prevention Act, 1876, s. 7, it is provided that every local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers.

3. The defendants are the local authority for the urban district of Oswaldtwistle, and as such have under their control the sewers within the said district.

4. The plaintiff is a paper manufacturer, and is the owner and occupier of premises, namely, a factory called the Whiteash Paper Mill, within the said district.

5. The plaintiff desires to cause his drains to empty into the sewers of the defendants, and to carry into such sewers the liquids proceeding from his factory or manufacturing processes, and is willing to do all things on his part to be done in that behalf pursuant to the said Acts; but the sewers within the district are not such as are necessary for effectually draining the said district for the purposes of the Public Health Act, 1875, and in particular are not such as are necessary for effectually draining the plaintiff's said premises, whereby the plaintiff is unable to cause his drains to empty into the said sewers, or to carry into them the liquids proceeding from his factory or manufacturing processes.

6. The plaintiff has required the defendants pursuant to the said Acts to cause to be made such sewers as may be necessary for effectually draining their said district, and in particular for effectually draining his said premises, and to give facilities for enabling him to carry into their sewers the liquids proceeding from his factory or manufacturing processes; but the defendants have refused and refuse to comply with such requirements.

The plaintiff claims a mandamus commanding the defendants to cause to be made such sewers as may be necessary for

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effectually draining their district for the purposes of the Public Health Act, 1875, and to give facilities for enabling the plaintiff to carry the liquid proceeding from his factories or manufacturing processes into the sewers under their control.

The following are the material paragraphs of the statement of defence:—

1. As to so much of the plaintiff's claim as is for a writ of mandamus commanding the defendants to cause sewers to be made, the defendants object that the action does not lie in law and that no such writ can be granted, on the ground that the plaintiff's remedy (if any) is to make a complaint to the Local Government Board pursuant to s. 299 of the Public Health Act, 1875, and also on the ground that the only remedy for the defendants' alleged non-compliance with s. 15 of the said Act is the making of such complaint, and on the ground that the said writ is claimed only as ancillary to or for the purposes of the claim for the writ in paragraph 2 hereof referred to, and that the plaintiff's claim for such lastly mentioned writ is bad on the grounds in paragraph 2 hereof set forth, and on the ground that the obligation imposed by s. 15 of the said Act does not extend to obligations imposed by the Rivers Pollution Prevention Act, 1876, s. 7, nor to provision for the receipt of the liquids from the plaintiff's factory, and on the ground that the plaintiff has disclosed no case shewing that the Court ought to exercise its discretionary power (if any) of granting a writ in the plaintiff's favour.

2. As to so much of the plaintiff's claim as is for a writ of mandamus commanding the defendants to give the plaintiff facilities to carry his liquids into the sewers under the defendants' control, the defendants object that the action does not lie in law and that no such writ can be granted on the ground that the plaintiff's remedy (if any) is to proceed under and in accordance with the Rivers Pollution Prevention Act, 1876, s. 10, and on the ground that this honourable Court has no jurisdiction to entertain the action, the remedy provided by law being in the county court of the place where the alleged offence against the said Act was committed, and on the ground that s. 7 is not applicable in regard to sewers not yet constructed,

and on the ground that the plaintiff has not disclosed any case shewing that the Court ought to exercise its discretionary power (if any) of granting a writ in the plaintiff's favour. Of the remainder of the defence only paragraph 7, which alleged that the plaintiff had not given the two months' notice required by the Rivers Pollution Prevention Act, 1876, and paragraph 11, which stated that the plaintiffs had ceased to be occupiers of the premises and had parted with their interest to a limited company, need be referred to.

The limited company were added as plaintiffs by Charles J. during the course of the argument. (1)

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 15, "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act"; and s. 21 gives power to owners and occupiers within the district to drain into the sewers of the local authority. By s. 299, "where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers, ... the Local Government Board, if satisfied, after due inquiry, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint. If such duty is not performed by the time limited in the order, such order may be enforced by writ of mandamus, or the Local Government Board may appoint some person to perform such duty. . . ."

By the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 7, "Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers:

"Provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise be injurious in a sanitary point of view:

"Provided also, that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, nor where such facilities would interfere with any order of any court of competent jurisdiction respecting the sewage of such authority."

By s. 10, "The county court having jurisdiction in the place where any offence against this Act is committed may by summary order require any person to abstain from the commission of such offence, and where such offence consists in default to perform a duty under this Act may require him to perform such duty in manner in the said order specified." The section then provides (inter alia) for penalties for default in complying with any

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Bigham, Q.C. (*C. A. Russell,* with him), for the plaintiffs. An unqualified legal obligation to make sewers for draining their district is imposed on local authorities by s. 15 of the Public Health Act, 1875, which is enforceable by the ordinary legal remedy of mandamus; that remedy is not affected by the provisions of s. 299 as to an application to the Local Government Board, for that body will only inquire into questions of fact, such as the best mode of draining a district, and will not decide questions of legal liability. The obligation to give facilities under s. 7 of the Rivers Pollution Prevention Act, 1876, is no doubt subject to the qualifications contained in that section; but the fact that the defendants are under this qualified liability does not exclude the unqualified liability to make sewers imposed by the Public Health Act, 1875. The remedy by application to the county court given by s. 10 of the Rivers Pollution Prevention Act is not an exclusive remedy; the plaintiffs' claim is substantially based, not on that Act, but on the Public Health Act.

Joseph Walton, Q.C., and *Danckwerts*, for the defendants. The claim of the plaintiffs is made under both the Public Health Act and the Rivers Pollution Prevention Act, and those Acts must be looked at together. Where a local authority neglects its duty under the Public Health Act of making sewers, a complete remedy is provided by an application to the Local Government Board under s. 299 of that Act. That remedy is exclusive, in accordance with the general principle of law that where a statute creates a duty and gives a specific remedy for non-performance, that is the only remedy which can be pursued: *Doe* v. *Bridges* (1); *Wolverhampton Waterworks Co.* v. *Hawkesford* (2); *Reg.* v. *Hall.* (3) There is nothing in the Public Health Act to limit the jurisdiction of the Local Government

requirement of the order of a county court, and for appointing a person to carry the order into effect.

By s. 11 an appeal to the High Court both on the law and the merits is given from the decision of a county court, and provision is made for the removal of plaints from the county court to the High Court by leave of any judge of the High Court.

(1) (1831) 1 B. & Ad. 847, at p. 859.

(2) (1859) 6 C. B. (N.S.) 336, at p. 356.

(3) [1891] 1 Q. B. 747.

Board to questions of fact, or to prevent their considering the question of liability. Further, even if the remedy under s. 299 is not exclusive, it is sufficient and appropriate, and there being such a remedy the Court will not grant a mandamus, whether the plaintiff brings an action of mandamus or applies for a prerogative writ: *Bush* v. *Beavan* (1); *Reg.* v. *Registrar of Joint Stock Companies* (2); *In re Nathan.* (3)

Even if the facts are as alleged in the statement of claim, the defendants are under no obligation to provide the sewers. The sewers are not required for the purposes of the Public Health Act, but for the purposes of the Rivers Pollution Prevention Act; that is, in order to afford facilities to the plaintiffs for enabling them to carry the liquids from their factory into the sewers. It was not intended to compel local authorities to make sewers for carrying off manufacturing refuse; and the new duties imposed by those statutes are confined to making sewers and giving facilities for carrying off ordinary sewage and drainage. "House refuse" does not include refuse from a factory: *London and Provincial Laundry Co.* v. *Willesden Local Board.* (4) The provisions of s. 7 of the Rivers Pollution Prevention Act apply only to existing sewers; they have no application to sewers which have yet to be made. Under s. 10 of the Rivers Pollution Prevention Act application must be made in the first instance to the county court, which has ample powers to deal with the matter subject to a right of appeal, and also to a right to remove the proceedings into the High Court; that remedy is exclusive: *Hertford Union* v. *Kimpton.* (5) No notice has been given under s. 13 of the Rivers Pollution Act, 1876.

[They also cited *Reg.* v. *Cockerell* (6); *Reg.* v. *Staines Union* (7); *Reg.* v. *Tottenham Local Board.* (8)]

C. A. Russell, in reply. To see whether the Legislature intended a statutory remedy to be exclusive, one must look at the Act of Parliament which creates the liability and gives the

(1) (1862) 1 H. & C. 500; 32 L. J. (Ex.) 54.
(2) (1888) 21 Q. B. D. 131.
(3) (1884) 12 Q. B. D. 461.
(4) [1892] 2 Q. B. 271.
(5) (1855) 11 Ex. 295; 25 L. J. (M.C.) 41.
(6) (1871) L. R. 6 Q. B. 252.
(7) (1893) 62 L. J. (Q.B.) 540.
(8) (1893) 9 T. L. R. 414.

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remedy: *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1) There is nothing in the Public Health Act to shew an intention to make the remedy given by s. 299 an exclusive remedy, or to make it applicable to cases where the question is whether the local authority has any obligation under s. 15. Mandamus is the appropriate remedy for the non-performance of a statutory duty, and the Courts have often expressed the opinion that it would lie to compel a local authority to make a sewage scheme: *Glossop* v. *Heston and Isleworth Local Board* (2); *Attorney-General* v. *Guardians of Dorking* (3); *Kirkheaton Local Board* v. *Ainley*. (4) As to what may be put in the sewers, s. 17 of the Public Health Act shews that it is more than ordinary sewage, and by the definition in s. 4 "house" includes factories.

Cur. adv. vult.

Dec. 11. The following written judgment was delivered by

CHARLES J. This was an action for a mandamus argued before me on November 11. It raised several important questions of law upon the construction of the Public Health Act, 1875, and the Rivers Pollution Prevention Act, 1876, which the parties agreed should be argued before the hearing of the cause, and as to which I have now to give my decision.

The plaintiff in the action when originally brought in October, 1895, was Philip Cadell Peebles, a paper manufacturer, who was owner and occupier of a factory called the Whiteash Paper Mill within the district for which the defendants are the local authority. On November 25 Mr. Peebles died, and the action, which was held by the Court of Appeal to survive, was continued by his executors, who were duly added as plaintiffs. On July 27, 1896, they sold to a company, who were added, with their consent, by my order at the hearing.

The plaintiffs, as stated in the fifth paragraph of their statement of claim, "desire to cause their drains to empty into the sewers of the defendants, and to carry into such sewers the liquids proceeding from their factory or manufacturing pro-

(1) (1877) 2 Ex. D. 441.
(2) (1879) 12 Ch. D. 102.
(3) (1882) 20 Ch. D. 595.
(4) [1892] 2 Q. B. 274.

cesses . . . . but the sewers within the district are not such as are necessary for effectually draining the plaintiffs' premises, whereby they are unable to cause their drains to empty into the defendants' sewers, or to carry into them the liquids proceeding from their factory or manufacturing processes." The plaintiffs then alleged that they had demanded of the defendants that they should cause to be made such sewers as might be necessary for effectually draining their district, and in particular for effectually draining the plaintiffs' premises; and further that the defendants should, according to the provisions of the Rivers Pollution Prevention Act, 1876, give facilities for enabling the plaintiffs to carry into the sewers the liquids proceeding from their factory or manufacturing processes. The defendants declined to comply with these demands; and the plaintiffs now claim a mandamus to compel the defendants, first, "to cause to be made such sewers as may be necessary for effectually draining their district for the purposes of the Public Health Act, 1875; and, secondly, to give facilities for enabling the plaintiffs to carry the liquid proceeding from their factories or manufacturing processes into the sewers under their control."

I will deal first with the claim so far as it depends on the Public Health Act, 1875, and consider, apart at present from the question of the form of remedy, whether the local authority of a district are bound to provide sewers sufficient to carry off the effluents coming from manufactories within their district. If they are so bound, then in the present case—taking the facts to be as stated in the pleadings for the purpose of this argument but not otherwise—they have failed to perform their obligation.

The plaintiffs contend that this duty is imposed by s. 15, which enacts that "every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act," and that by s. 21 they, as owners or occupiers of premises within the district, are "entitled" under the regulations therein mentioned to cause their drains to empty into the sewers.

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The duty, it will be observed, is imposed "for the purposes of this Act," and those purposes must be taken to be sanitary purposes. Part III., in particular, is headed, "Sanitary Provisions: Sewerage and drainage." There is, however, no definition of sewage in the Act; but it was contended by the defendants that the duty imposed was confined to providing for sewage properly so called; and reliance was placed upon s. 27, which provides for the disposal of sewage, and the terms of which seem to indicate that only ordinary sewage was included. The meaning given by the interpretation clause (s. 4) to the word "drain" may also be referred to as pointing in the same direction. But neither the language of s. 27 nor the definition of drains appears to me to be decisive. On the other hand, the interpretation clause (s. 4) clearly contemplates something beyond mere domestic drainage. "Premises" includes buildings, and "house" includes factories. Again, s. 17, which directs the purification of sewage before its being discharged into streams, speaks of sewage or filthy water—terms wide enough to include the liquids coming from manufacturing processes. It is clear, I think, from these definitions of "premises" and "house," that the owner or occupier of a factory is entitled under s. 21 to connect his premises by a drain with the sewer. But having done so, what may be put into the drain? Is he to be limited to passing into it ordinary sewage only? I think not. In my opinion he may use the drain to its utmost capacity, and pass liquids of all kinds into it, including those coming from his manufacturing processes, provided, indeed, that they are not liquids injurious to health. This would have been preventible by injunction under the nuisance clauses of the Act of 1875 (see especially s. 91), and is now expressly forbidden by the Public Health Act, 1890, s. 17.

But the defendants contended that, even assuming they have made default in providing the sewers necessary for effectually draining their district under s. 15, no mandamus should issue, because by s. 299 another remedy was prescribed for their breach of duty, if any. The duty imposed, they said, was a new one, and in the same statute the remedy for default of performance was given. Therefore, they argued, the principle

applies which was laid down by Lord Tenterden C.J. in *Doe* v. *Bridges* (1), and which has been approved of in many other cases, that "where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." This argument, if in fact well founded, would, no doubt, be a complete answer to an application for the prerogative writ, and it is not disputed that the same considerations apply to an action of mandamus: see *Bush* v. *Beavan*. (2) Further, it was said that, if not an exclusive remedy, s. 299 provided a sufficient and convenient remedy, and, if so, according to the well-known practice, no mandamus would be granted. I felt upon the hearing much pressed by these arguments; but, upon consideration, I have come to the conclusion, so far as regards the Act of 1875, that they ought not to prevail. The provisions of s. 299, so far as is material, are as follows: "Where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers, the Local Government Board, if satisfied after due inquiry that the authority has been guilty of the alleged default, shall make an order limiting the time for the performance of their duty in the matter of such complaint; if such duty is not performed by the time limited in the order, such order may be enforced by writ of mandamus, or the Local Government Board may appoint some person to perform such duty." Now, the question raised in the present case under the Act of 1875 is one of law and not of fact, namely, whether the defendants are bound to provide sewers for liquids coming from the plaintiffs' manufacturing premises at all, and to such a question I do not think that s. 299 has any application. Unless excluded expressly, the plaintiffs have, in my opinion, a right to the judgment of a court of law upon the matter; but if the Local Government Board take the same view as the defendants they will never get it. The section, introduced by the words "where complaint is made," does not seem to me to make it imperative on the plaintiffs to make a complaint of the sort now under consideration to the Local Government

(1) 1 B. & Ad. 847, at p. 859. (2) 1 H. & C. 500; 32 L. J. (Ex.) 54.

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Board and to submit to their interpretation of the statute. It does not, therefore, provide an exclusive remedy within the meaning of Lord Tenterden's language in *Doe* v. *Bridges* (1), nor a sufficient and appropriate remedy in the sense in which those words are used, as constituting a bar to an application for a mandamus. Upon the latter point I may refer to the judgment of the Master of the Rolls in *In re Nathan* (2), where he lays down the true principle upon which a mandamus may be granted or refused: "Where there is no specific remedy by which justice can be done the Court will grant a mandamus; but where there is a specific remedy by which the subject will get justice by a judicial decision of the courts, then it is within the reason of the rule that if there is such a remedy a mandamus ought not to issue." I should add that the Lords Justices in *Glossop* v. *Isleworth Local Board* (3) appear to have considered that a mandamus could properly issue to a local authority to enforce performance of their duty under s. 15, though the case is not a decision upon the point. To the same effect is the language of Bowen L.J. in *Kirkheaton Local Board* v. *Ainley* (4), when commenting (5) on the case of *Attorney-General* v. *Dorking* (6), and again in his judgment. (7)

I now proceed to consider the claim of the plaintiffs under the Rivers Pollution Prevention Act, 1876, for a mandamus to compel the defendants to give facilities for enabling them to carry the liquids proceeding from their factories into the sewers under their control. A very few words will suffice to dispose of it. I may observe in passing that the powers of this Act are cumulative (see s. 16), and do not in any way abridge powers given to persons under other Acts, such as the Public Health Act, 1875. The section relied on by the plaintiffs is s. 7, which enacts that "every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing pro-

(1) 1 B. & Ad. 847, at p. 859.
(2) 12 Q. B. D. 461, at p. 475.
(3) 12 Ch. D. 102.
(4) [1892] 2 Q. B. 274.
(5) [1892] 2 Q. B. at p. 278.
(6) 20 Ch. D. 595.
(7) [1892] 2 Q. B. at p. 284.

cesses into such sewers." The section, it will be noted, applies only to existing sewers, and it contains the provisoes, which I have to assume for the purposes of the argument are inapplicable, and to which, therefore, I need not further refer. Now, if this section stood alone, I have no doubt that a mandamus would be granted to compel the authority to give requisite facilities, so far as regards existing sewers. But by s. 10 another sufficient and appropriate remedy for default is provided. The county court is thereby constituted the proper tribunal to enforce the performance of the duty; and by s. 11 an appeal to the High Court is provided, or the plaint may by leave of a judge be removed into the High Court. This is, in my opinion, a complete answer to the claim of the plaintiffs for a mandamus under s. 7. Here there is "a specific remedy provided by which the subject will get justice by a judicial decision of the courts." It is needless to inquire under these circumstances whether the provisions of s. 13 as to notice of proceedings for offences against the Act apply to an application to enforce the duty imposed on the local authority by s. 7. No such notice had in fact been given in the present case.

My judgment, therefore, must be against the plaintiffs, so far as regards their subsidiary claim for facilities to discharge their liquids into existing sewers; but I am of opinion that they are entitled to a mandamus commanding the defendants to cause to be made such sewers as may be necessary for effectually draining their district under the Public Health Act, 1875, and in particular the plaintiffs' premises; and I give judgment on the points of law submitted to me accordingly for the plaintiffs for a mandamus to that effect. All questions of costs will be reserved to be dealt with by the judge at the hearing of the cause.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Pritchard, Englefield & Co., for Boote & Edgar, Manchester.*

Solicitors for defendants: *Soames, Edwards & Jones, for Costeker, Darwen.*

W. J. B.

1896
Dec. 12.

COLLMAN *v.* MILLS.

London—Slaughter-houses—Validity of By-law—Improper Slaughtering of Cattle by Servant contrary to Instructions—Liability of Occupier.

By-laws made under the repealed Slaughter-houses (Metropolis) Act 1874, but kept in force by s. 142, sub-s. 2 (*b*), of the Public Health (London) Act, 1891, make it an offence for the licensed occupier of a slaughter-house to slaughter sheep in the pound of the slaughter-house or in view of other sheep. During the absence of the respondent, the licensed occupier of a slaughter-house, his foreman, in direct disobedience of his orders and in order to save himself trouble, slaughtered a sheep in the pound in view of other sheep:—

Held, that the by-law was good and that the respondent was guilty of an offence under it, for he was liable for the act of his servant, that act having been committed within the general scope of his employment, although contrary to the orders of his master.

Case stated by a metropolitan police magistrate.

The respondent had appeared to answer the complaint of the appellant on behalf of the London County Council upon two summonses: the first charged that he, being the occupier of a licensed slaughter-house, did unlawfully slaughter certain sheep in the pound attached to the said slaughter-house contrary to the by-laws for regulating the business of a slaughterer of cattle made in pursuance of the Slaughter-house Act, 1874 (1); the second charged him with unlawfully slaughtering certain sheep in the view of other sheep, contrary, &c. The material part of the by-law in question was as follows: "An occupier of a slaughter-house (*a*) shall not slaughter or permit to be slaughtered any animal in any pound, pen, or lair, or in any part of the premises other than the slaughter-house; (*c*) shall not slaughter or permit to be slaughtered any animal within public view or within the view of any other animal."

(1) By s. 4 of the Slaughter-houses, (&c.), Metropolis Act, 1874 (37 & 38 Vict. c. 67), power is given to the local authority to make by-laws for regulating the conduct of any businesses specified in the Act. That Act is repealed by s. 142, sub-s. 1, of the Public Health (London) Act, 1891; but by s. 142, sub-s. 2 (*b*), by-laws made under any Act thereby repealed are to have the same validity and effect as if they had been made under that Act.

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The respondent was the occupier of a licensed slaughter-house. On May 11, 1896, a sheep was slaughtered in the pound and not in the slaughter-house, and in view of and close to eight or nine live sheep; it was slaughtered by one Brigden, a foreman and slaughterman in the employ of the respondent, whose business it was to slaughter animals for the respondent, but who had no general authority to manage his business. The respondent was absent from the premises at the time, and had forbidden his servants to do the acts complained of or either of them, and Brigden in acting as he had done admitted that he had disobeyed orders, and had so done in order to save himself trouble.

The learned magistrate found that the acts were done without the knowledge of the respondent, and dismissed the summonses on the ground that he could not be said to have permitted that which was done in his absence without his knowledge and against his express prohibition, and was not done by a person who had a general authority to manage his business; he referred to the decision in *Somerset* v. *Wade*. (1) The question for the Court was whether the decision was right in law.

Avory, for the appellant. The respondent ought to have been convicted. The decision of the magistrate proceeded upon the ground that the respondent had not permitted the acts complained of; but he was not charged with permitting the sheep to be slaughtered in an improper manner, but with unlawfully slaughtering it, and to that charge the maxim "Qui facit per alium facit per se" applies. The foreman was acting within the scope of his employment, and his employer was therefore liable for his acts: *Commissioner of Police* v. *Cartman*. (2) It was impossible to take proceedings against the foreman, for the by-laws apply to occupiers only, and not to their servants.

Morton W. Smith, for the respondent. The argument that the by-law contains an absolute prohibition of the doing of the act, and that, therefore, the case of *Commissioners of Police* v.

(1) [1894] 1 Q. B. 574. (2) [1896] 1 Q. B. 655.

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Cartman (1) applies, cannot be maintained. Looking at the decisions under the Licensing Acts it is clear that their effect is that, unless there is an express statutory prohibition of an act, knowledge on the part of the person charged is an essential ingredient of the offence. That being the rule of the common law, a by-law must not be repugnant to it, and cannot make a master responsible for an act of his servant of which he is ignorant, unless the statute authorizing the making of the by-law expressly authorizes its being so framed. In the present case the act of the servant was not to the advantage of the master, whereas in the case of a publican it is to his advantage for his servant to sell his beer, even if the sale be in contravention of the licensing laws. [He cited *Massey* v. *Morriss* (2); *Cundy* v. *Le Cocq* (3); *Bond* v. *Evans* (4); *Somerset* v. *Hart* (5); *Newman* v. *Jones* (6); *Sherras* v. *De Rutzen* (7); *Nichols* v. *Hall* (8); *Reg.* v. *Stephens* (9); *Small* v. *Warr.* (10)]

Avory, in reply. It is immaterial whether the doing of the particular act is prohibited in a by-law or in the statute itself. In the present case the by-law is in consonance with the general law as to the responsibility of a master for the acts of his servants. The statute gives the county council authority to make by-laws for the conduct of the business of the keeper of a slaughter-house, and the authority so given is wide enough to support such a by-law as the present, interpreted in the sense contended for by the appellant.

WILLS J. This case has presented some little difficulty, and raises one very important point; but I think that it may be disposed of in consonance with the principles of law applicable to by-laws, and that we may consistently with those principles hold that the offence charged has been committed. The objection taken by the respondent is a good one, if it applies properly to this case; and I understand it to be this. By the common law a man is not criminally responsible for things

(1) [1896] 1 Q. B. 655.
(2) [1894] 2 Q. B. 412.
(3) (1884) 13 Q. B. D. 207.
(4) (1888) 21 Q. B. D. 249.
(5) (1884) 12 Q. B. D. 360.
(6) (1886) 17 Q. B. D. 132.
(7) [1895] 1 Q. B. 918.
(8) (1873) L. R. 8 C. P. 322.
(9) (1866) L. R. 1 Q. B. 702.
(10) (1882) 47 J. P. 20.

done by his servants without his knowledge; the offence here charged is a crime, and, therefore, by the common law the respondent, who did not know what was done, is not responsible. A by-law, it is said, must not be repugnant to the common law, unless it is within the express power given by the Act of Parliament under which it is made, and therefore when dealing with a by-law one cannot say, as one always can in the case of an Act of Parliament, that the authority which makes the enactment may make a crime of that which at common law could not be criminal. It is argued that it is a violation of all ordinary principles of the common law that a by-law by itself should have such an effect, though no doubt it might have it if made under express statutory authority to make a by-law of that character. Now it is true that a by-law must be, as a general rule, consistent with the principles of the common law; that if it violates those principles it is bad, and it follows that if it is capable of two constructions, one of which would make it bad and the other good, we must adopt that construction which will make it consonant with the principles of the common law.

The argument for the respondent, therefore, is that when the by-law says "shall not slaughter," this prohibition is to be construed in a fashion at variance with the construction which has been put upon the expression "shall not sell" in the Licensing Act. The by-law, however, was made under a statutory power given to the county council to regulate the conduct of the business of slaughter-houses. It must always be remembered, too, that there is a distinction between things criminal in themselves—that is, things morally wrong and wicked, and things which are made criminal and are prohibited under a penalty simply for the public good. But apart from that consideration, I think that the powers given to make by-laws for this particular purpose are wide enough to give a statutory authority to make the regulation in question. I agree with the suggestion on behalf of the appellant, that if a by-law said that the business should be so conducted that no animal should be slaughtered in the pound and in view of another animal, it would be perfectly good; and I do not think that this by-law

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does more than say so in other language. It being in the power of the local authority to make by-laws for regulating the conduct of the business, the by-laws so made must receive a natural construction; that is, they must be held to cover the acts of servants as well as those of the proprietor of the business.

It has been pointed out in many cases that in businesses of this kind, which often are carried on upon an extensive scale and necessitate the employment of numerous servants, legislation would be useless if the master were not to be liable to penalties for his servant's acts as well as the servant himself. The business of a slaughter-house may be carried on on a very extensive scale: the proprietor may employ a dozen or more servants, and the slaughtering may be done by any of the servants or by himself. As I am of opinion that there was power to make such a by-law as the present one, and to affix a penalty to its breach, I think that the case must be remitted to the learned magistrate for conviction.

WRIGHT J. I am of the same opinion. It seems that the local authority has power under the Act, where a person chooses to take out a licence, to say that he shall only have such licence upon the terms that he will carry on the business in a particular way, and that he, being the licensed person, shall be liable for any breach of the regulations by himself or his servants. There is no obligation upon a person to come under the by-law or to take out a licence; if he does take one out, he must see that the conditions are obeyed by his servants as well as by himself.

Judgment for appellant.

Solicitor for appellant: *Blaxland.*
Solicitor for respondent: *W. T. Ricketts.*

W. J. B.

DUNN *v.* MACDONALD.

1896
Dec. 8.

Principal and Agent—Liability of Agent—Warranty of Authority—Contract made by Public Servant of Crown.

The doctrine that an agent who makes a contract on behalf of his principal is liable to the other contracting party for a breach of an implied warranty of his authority to enter into the contract is not applicable to a contract made by a public servant acting on behalf of the Crown.

Collen v. *Wright*, (1857) 8 E. & B. 647, considered and distinguished.

ACTION tried before Charles J. without a jury.

The plaintiff alleged in his statement of claim that the defendant, who was Her Majesty's Commissioner and Consul-General for the Oil Rivers Protectorate (now known as the Niger Protectorate) in Africa, had engaged him to enter his service, and serve under him in the Protectorate on the terms that he was engaged for, and was to serve for, three years certain; and the plaintiff claimed salary and allowances as damages for wrongful dismissal before the end of the three years. Alternatively, the plaintiff alleged that the defendant untruly represented and warranted to the plaintiff that as Her Majesty's Commissioner for the Protectorate he was duly authorized and empowered to engage the plaintiff for the service of and on behalf of Her Majesty for three years certain, whereby the plaintiff was induced to accept an engagement to serve Her Majesty; and the plaintiff claimed damages for the breach of the alleged warranty. The defendant denied that the plaintiff entered his service, and alleged that he was in the service of Her Majesty, and further denied the alleged warranty and breach.

The plaintiff had on a previous occasion unsuccessfully brought a petition of right against the Crown in respect of the same dismissal, in which he had claimed damages on the footing of being a servant of the Crown: *Dunn* v. *Reg.* (1)

W. H. Stevenson, for the plaintiff. First, the engagement

(1) [1896] 1 Q. B. 116.

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amounted to a contract to serve the defendant personally for three years certain, and, there being nothing to prevent a public servant of the Crown in the position of the defendant from making such a contract, he is liable in damages for the wrongful dismissal of the plaintiff. Secondly, if the true relationship between the parties was that the plaintiff was the servant of the Crown and not of the defendant personally, the latter is liable for a breach of the implied warranty that he had authority to engage the plaintiff as a servant of the Crown for three years certain, in accordance with the doctrine laid down in *Collen* v. *Wright*. (1) There is nothing to prevent the principle of that decision applying to the case of a public servant of the Crown. There is no authority for the proposition that the Crown cannot bind itself to engage a servant for a definite period of time; the authority of the Crown cannot be so limited. If the Crown can do so itself, it can appoint an agent to do so on its behalf; and the defendant, having impliedly warranted that he had an authority which he might have possessed, though in fact he did not possess it, is liable for a breach of such warranty. [He cited *Dunn* v. *Reg.* (2); *De Dohsé* v. *Reg.* (3); *Shenton* v. *Smith* (4); *Gould* v. *Stuart* (5); *Buron* v. *Denman* (6); *Cherry* v. *Colonial Bank of Australasia* (7); Chitty's Prerogative of the Crown, p. 81; Bac. Abr. "Offices and Officers (H)"; 22 Geo. 3, c. 75; 54 Geo. 3, c. 61.]

The Solicitor-General (*Sir R. B. Finlay, Q.C.*), (*H. Sutton* with him), for the defendant. The plaintiff is estopped by the proceedings in *Dunn* v. *Reg.* (2) from saying that he was in the service of the defendant personally, and can only be regarded as having been a servant of the Crown. Treating him as such, the Crown itself could not enter into such a contract as that suggested; it would be contrary to public policy that it should be allowed to bind itself to employ a servant for a definite period. On the question of warranty of authority, the doctrine of *Collen* v. *Wright* (1) has no application to the case of a

(1) 8 E. & B. 647.
(2) [1896] 1 Q. B. 116.
(3) (1886) 3 T. L. R. 114.
(4) [1895] A. C. 229.
(5) [1896] A. C. 575.
(6) (1848) 2 Ex. 167.
(7) (1869) L. R. 3 P. C. 24.

public servant who contracts on behalf of the Crown; the position of such a servant is clearly laid down in the judgment of Dallas C.J. in *Gidley* v. *Lord Palmerston* (1), where his non-liability for acts done by him in his public character or employment is strongly insisted on: the same principle is asserted in *Macbeath* v. *Haldimand*. (2) Assuming that there has been any misrepresentation at all, it was not a misrepresentation of fact but of law, and the doctrine of *Collen* v. *Wright* (3) does not apply to a warranty of a question of law. [He also cited *Palmer* v. *Hutchinson* (4); *Beattie* v. *Lord Ebury* (5); *Richardson* v. *Williamson* (6); *Rashdall* v. *Ford*. (7)]

W. H. Stevenson, in reply.

CHARLES J. The plaintiff in this case bases his claim in two ways: first, upon an absolute contract of service with the defendant whereby he was to be retained in his service until January 29, 1895, at the earliest; and, secondly, upon an alleged warranty of authority by the defendant to the effect that he was duly authorized by Her Majesty to engage the plaintiff for Her service, and that the latter was thereby induced to accept the engagement into which he entered—that is, an engagement to serve the Queen upon the terms and conditions put before him. The plaintiff in his statement of claim alleges that the defendant was not so authorized, and that by reason of the premises the plaintiff, notwithstanding that he had diligently and faithfully observed the terms of the engagement, was dismissed before the completion of the term. It should be stated that at the time the agreement was entered into, the defendant was acting under an appointment from the Crown under the sign manual as Consul-General and Commissioner of the Oil Rivers Protectorate.

Dealing with these grounds separately, I consider that I am bound by what took place on the hearing of the plaintiff's petition of right. (8) There he treated himself as a servant of the Crown, and sought compensation from the Crown for the same wrongful dismissal which he now makes the ground of

(1) (1822) 3 B. & B. 275.
(2) (1786) 1 T. R. 172.
(3) 8 E. & B. 647.
(4) (1881) 6 App. Cas. 619.
(5) (1872) L. R. 7 Ch. 777.
(6) (1871) L. R. 6 Q. B. 276.
(7) (1866) L. R. 2 Eq. 750.
(8) See *Dunn* v. *Reg.*, [1896] 1 Q. B. 116.

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his claim against the Crown's agent. It was there held, both by Day J. and by the Court of Appeal, that, being a servant of the Crown, as he himself then asserted he was, his appointment, though civil, was an appointment at the pleasure of the Crown only. That being the position which he then took up, it would be inconsistent both with principle and authority to allow him to maintain an action on the same circumstances against the alleged agent as his employer. He cannot be allowed to claim damages from the principal on the ground that he was the servant of the principal, and afterwards to change his ground and claim damages in respect of the same services from the agent. I think, therefore, that the plaintiff's first cause of action must fail.

But a more difficult question remains, upon which the main part of the argument has turned. The plaintiff contends that, even admitting that he cannot maintain this action against the defendant as an action for wrongful dismissal founded upon an ordinary contract of service, he is nevertheless entitled to say that the defendant warranted to him that he had authority to engage him for three years, whereas he had no such authority, and that therefore, upon the well-known principle of *Collen* v. *Wright* (1), he has a right to recover against the defendant damages for the loss incurred by the breach of warranty. Now, there is no doubt that in many cases much hardship might arise if such an action were not maintainable; but after a careful consideration of the cases cited during the argument I have come to the conclusion that the doctrine of *Collen* v. *Wright* (1) is, upon grounds of public policy, not applicable to persons in the public employment of the Crown. It is true that in *Gidley* v. *Lord Palmerston* (2), which is one of the earlier cases on the subject, it is not said in so many words that an action of this nature will not lie against a public servant; but it is evident that, if such an action were maintainable, it would be a circuitous mode of getting over the difficulty which always must exist, and ought to exist, where a public servant does an act in the performance, as he conceives, of his duty to his Sovereign. The case of *Macbeath* v. *Haldimand* (3)

(1) 8 E. & B. 647.

(2) 3 B. & B. 275.

(3) 1 T. R. 172.

is as strong as, if not stronger than, *Gidley* v. *Lord Palmerston* (1), as to the immunity to which persons in such a character or employment have a right. In the last-named case Dallas C.J. says (2): "It will be sufficient to advert to a class of cases, too well-known and established to require to be more particularly mentioned, and which in substance and result have established that an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be in the particular instance a breach of such employment and constituting a particular and personal liability." Now, there is no doubt that what was done in the present case by the defendant was done in his public character or employment; he had not the slightest notion of engaging the plaintiff in any other capacity than as a servant of the Crown; and is it to be said that under those circumstances, and although no action can be maintained against the defendant for a breach of contract, if the plaintiff has been wrongfully dismissed, the defendant has nevertheless taken upon himself a particular and personal liability by warranting that the Crown will retain the services of the plaintiff for three years when he had no authority to do so, and that if he has made such a warranty without authority he is liable to be sued on it? It seems to me impossible so to hold; and in reference to such a contention I may adopt the language of Ashhurst J. in *Macbeath* v. *Haldimand* (3): "No man would accept of any office of trust under Government upon such conditions; and indeed it has frequently been determined that no individual is answerable for any engagements which he enters into on their behalf. There is no doubt but the Crown will do ample justice to the plaintiff's demands if they be well founded"; and in the same case Buller J. says: "Where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable." It would of course be going too far to say that because a man is a servant of the Crown he cannot enter into any personal liability; but when he is acting in his public character he cannot in my opinion be sued upon an engagement

(1) 3 B. & B. 275.

(2) 3 B. & B. at p. 286.

(3) 1 T. R. at p. 181.

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DUNN v. MACDONALD.

Charles J.

into which he enters, because it is against public policy that he should in such a case incur personal responsibility.

The Solicitor-General further argued that, apart from any question of public policy and apart from the fact of the defendant being employed in the public service by the Crown, the doctrine of *Collen* v. *Wright* (1) did not apply, because at the worst any misrepresentation of which the defendant was guilty was a misrepresentation of authority on a matter of law and not of fact, namely, that he had power to enter into a contract for three years certain and to engage a servant of the Crown for that period, whereas in point of law he had not, inasmuch as the Crown can only lawfully retain servants during pleasure. The plaintiff's counsel met that argument thus: he said that the suggestion that the Crown cannot engage a servant for a term certain is unfounded, and that the Crown can, and from time to time does, engage persons for limited periods; that if the Crown can do so, it can delegate the authority to some one else, and that therefore in the present case the defendant misrepresented, not a question of law, but a question of fact—in other words, that he represented to the plaintiff that he had authority from the Crown to engage him for three years certain, an authority which he might have had in law, but which he had not in fact. My impression is that that argument is well founded, and that the Crown has power to engage a servant for a term certain and to delegate that power. If the case, therefore, had depended upon that point alone, I must have decided it in favour of the plaintiff; but it does not, for in my judgment the action is not maintainable upon grounds of public policy for the reasons I have already given. I do not think that the doctrine of an implied warranty of authority is applicable to a public servant; if it were, it would in my judgment make short work of a long series of decisions exempting public servants from all personal liability. I must therefore decide this case in favour of the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Dunn & Hilliard.*

Solicitor for defendant: *Solicitor to the Treasury.*

(1) 8 E. & B. 647.

W. J. B.

THE QUEEN *v.* CHARITY COMMISSIONERS FOR ENGLAND AND WALES.

1897
Jan. 12, 13.

Mandamus—Alternative Remedy—Scheme under Endowed Schools Act, 1869 (32 & 33 *Vict. c.* 56)—*Construction—Jurisdiction of Charity Commissioners.*

A scheme, made under the Endowed Schools Act, 1869, for the management of Christ's Hospital School, provides that a certain number of the Council of Almoners shall be appointed by the governors of the school on the nomination of the London School Board; and, by clause 143, that "any question affecting the regularity or the validity of any proceeding under this scheme shall be determined conclusively by the Charity Commissioners." Upon an application by the school board for a mandamus to compel the Charity Commissioners to decide a question which had arisen between the school board and the governors—namely, whether a lady could under the scheme be appointed an almoner:—

Held, that the mandamus ought not to issue:

By Wright and Bruce JJ., on the ground that the applicants had alternative convenient and effectual remedies—namely, by proceedings to have the question decided under the Charitable Trusts Act, 1853, s. 28, or by action against the governors in the ordinary courts;

By Wright J., also on the ground that the question which the Charity Commissioners were asked to decide was not a question affecting the regularity or the validity of any proceeding under the scheme within the meaning of clause 143.

RULE NISI, obtained on behalf of the School Board for London, for a writ of mandamus directed to the Charity Commissioners for England, commanding them to determine, under clause 143 of the scheme for the administration of the foundation known as Christ's Hospital, whether or not the governors of Christ's Hospital were bound to accept the nomination of the School Board for London, and to appoint Miss Eve as the representative of the school board on the governing body of the hospital.

The following facts were admitted, and appeared in an affidavit of the Secretary of the London School Board made in support of the application for the rule:—

A scheme, made by the Charity Commissioners in the matter of the foundation known as Christ's Hospital under the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), and amending

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Acts, was approved by Her Majesty in Council on August 15, 1890, and came into force on that day. (1)

By virtue of such scheme the endowments dealt with by it are administered by the governors and the Council of Almoners, and all duties and powers concerning the management and administration of the foundation, except as therein excepted, have become and are now vested in the Council of Almoners, who are composed of not more than forty-three persons, of whom two are ex-officio almoners and the rest nominated. The nominated almoners are by the scheme to be competent persons duly qualified to discharge the duties of the office, and six of them are to be appointed by the governors on the recommendation of the School Board for London.

Clause 143 of the scheme provides: "Any question affecting the regularity or the validity of any proceeding under this scheme shall be determined conclusively by the Charity Commissioners upon such application made to them for the purpose as they think sufficient."

After the scheme came into force the School Board for London duly recommended, and the governors duly appointed on such recommendation, six competent persons to serve as almoners.

In January, 1895, one of the almoners so appointed resigned, and the school board, having accepted his resignation, recommended the appointment of Miss Eve in his place.

The governors of Christ's Hospital refused to appoint Miss Eve an almoner on the grounds, first, that, being a woman, she was not qualified to be appointed an almoner under the scheme; and, secondly, that they had a discretion to refuse to appoint a competent person even though duly qualified to discharge the duties of the office and duly recommended.

The school board thereupon applied to the Charity Commissioners, under clause 143 of the scheme, to determine the regularity or the validity of the proceeding of the governors in refusing to appoint Miss Eve an almoner. The Charity

(1) By s. 45 of the Endowed Schools Act, 1869, a scheme made under the Act shall, when approved by Order in Council, "have full operation and effect in the same manner as if it had been enacted in this Act."

Commissioners refused to decide that question, and this rule was thereupon obtained.

Sir Richard Webster, A.-G. (*Dibdin* with him), for the Charity Commissioners, shewed cause against the rule. The Charity Commissioners ought not to be compelled to decide this difficult question as to the constitution of the governing body of Christ's Hospital. The jurisdiction of the Courts cannot be ousted unless by express stringent provisions, and there are no such provisions in the scheme. Clause 143 does not give the commissioners power to decide such a question as whether or not a woman is capable of being appointed a member of the governing body. It is not a question affecting "the regularity or the validity of any proceeding under the scheme." Those words are intended to give to the Charity Commissioners a visitatorial capacity—to provide a safeguard in respect of the acts done under the scheme by the governors, but not to cast upon the commissioners the duty of determining whether or not the governing body of the hospital has been properly constituted. That question relates to something to be done in order to bring the governing body into existence; it does not relate to any act done by virtue of any of the powers of administration given by the scheme. In *In re Hodgson's School* (1) Lord Selborne, in delivering the judgment of the Privy Council, pointed out (2) the effect of clauses similar to clause 143, which are in a common form, and are inserted in many schemes for the administration of endowed schools. He said: "Their purpose, that of establishing in the Commissioners, with respect to the cases for which they provide, a species of arbitral or visitatorial jurisdiction, sufficient to indemnify the Governors and to bind the objects of the charity within certain limits, may reasonably have been thought expedient for carrying the objects of the scheme into effect. And it is to be observed that they relate only to questions affecting the regularity or the validity of proceedings 'under the scheme,' and as to the proper construction or application of the provisions 'of the scheme.'"

(1) (1878) 3 App. Cas. 857. (2) 3 App. Cas. 868.

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[WRIGHT J. May not the question here be said to be as to the "proper construction" of the scheme?]

The question of "proper construction" is dealt with by clause 144, which provides that if "any doubt or question arises among the Governors or the Council of Almoners, or between those bodies, as to the proper construction or application of any of the provisions of this scheme, the Governors or the Council of Almoners, or both those bodies, as the case may require, shall apply to the Charity Commissioners for their opinion and advice thereon, which opinion and advice when given shall be binding on the Governors and the Council of Almoners and all persons claiming under the foundation who shall be affected by the question so decided." That clause strongly supports the view that the commissioners cannot be called upon to determine the question which has arisen between the London School Board and the governing body of Christ's Hospital.

Next, the granting of a mandamus is discretionary, and where the Court can see that the applicant has another equally convenient, beneficial, and effectual remedy, it will refuse to interfere by mandamus. The rule was stated and acted upon in *Reg.* v. *Registrar of Joint Stock Companies* (1), and it applies where the alternative remedy is against some one other than the person to whom the mandamus is to issue. Here the Court can see that there are other convenient ways of raising and having decided this question. The school board can make an application under s. 28 of the Charitable Trusts Act, 1853 (2),

(1) (1888) 21 Q. B. D. 131.

(2) The Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 28: "Where the appointment or removal of any trustee, or any other relief, order, or direction relating to any charity of which the gross annual income for the time being exceeds thirty pounds, shall be considered desirable, and such appointment, removal, or other relief, order, or direction might now be made or given by the Court of Chancery, in respect either of its ordinary or its special or statutory jurisdiction, or by the Lord Chancellor intrusted with the care and commitment of the custody of lunatics, it shall be lawful for any person authorized in this behalf by the order or certificate of the said board," (the Charity Commissioners) "or for the Attorney-General, to make application (without any information, bill, or petition) to the Master of the Rolls or one of the Vice-Chancellors sitting at chambers, for such order, direction, or relief as the nature of the

or can apply for a mandamus to compel the governors of Christ's Hospital to admit Miss Eve as an almoner, or can bring an action for an injunction, or for a declaration of her right to be elected; and an appeal lies in all those cases. It is submitted that, under the circumstances, this Court ought not to compel the commissioners to perform the invidious duty of deciding the question raised here.

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case may require; and the Master of the Rolls or the Vice-Chancellor to whom any such application shall be made shall and may proceed upon and dispose of such application in chambers, save where he may think fit otherwise to direct, and shall and may have and exercise thereupon all such jurisdiction, power, and authority, and make such orders and give such directions in relation to the matter of such application, as might now be exercised, made, or given by the Court of Chancery or by the Lord Chancellor intrusted as aforesaid, in a suit regularly instituted, or upon petition, as the case may require; and the Master of the Rolls and Vice-Chancellors respectively shall, in relation to such applications as aforesaid, and the proceedings thereon (subject to any rules which may be made by the Lord Chancellor, with the advice and consent of them or any two of them), have all such powers of directing matters to be heard in open court, and of ordering what matters shall be heard and investigated by themselves and their chief clerks respectively, and such other powers and authorities as by the Act of the last session of Parliament, chapter eighty, are vested in or authorized to be exercised by them at chambers, and the provisions of the said Act applicable to orders made by the Master of the Rolls or any of the Vice-Chancellors at chambers shall extend to all orders so made under this Act: Provided always, that, save as may be otherwise provided by any rules to be made by the Lord Chancellor, with such advice and consent as aforesaid, the determinations of the Master of the Rolls and Vice-Chancellors respectively upon and in relation to such applications as aforesaid shall not be subject to appeal in any case where the gross annual income of the charity does not exceed one hundred pounds: Provided also, that it shall be lawful for the Master of the Rolls or any Vice-Chancellor, where under the circumstances of any application as aforesaid he may so see fit, to direct that for obtaining the relief, order, or direction sought for by such application an information, bill, or petition, as the case may require, shall be filed or presented and prosecuted as now by law required, and to abstain from further proceeding on such application."

Sect. 43: "Every application to any judge or Court under the jurisdiction created or conferred by any of the provisions of this Act, may be made by Her Majesty's Attorney-General, or . . . . by all or any one or more of the trustees or persons administering or claiming to administer, or interested in, the charity which shall be the subject of such application, or any two or more inhabitants of any parish or place within which the charity is administered or applicable. . . ."

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Vaughan Hawkins, for the governors of Christ's Hospital, also shewed cause against the rule on the same grounds.

Ram, for the London School Board, supported the rule. The scheme has been duly approved, and has the same force as the statute which authorizes it; the commissioners, therefore, have a statutory duty, the performance of which can be enforced by mandamus. The action of the governors in refusing to admit Miss Eve, on the nomination of the school board, as an almoner, is a "proceeding" within clause 143 of the scheme. The nomination of Miss Eve, and her appointment by the governors, can only be made by virtue of the scheme. The object of the scheme, as appears from clauses 143, 144, is to give the widest power to the Charity Commissioners of deciding every question which may arise under it. It is a scheme sanctioned and evolved by the commissioners themselves. They exercise the powers given to them for many purposes, and they cannot refuse to exercise them for a particular purpose merely because the exercise of them for that purpose is distasteful. The alternative remedies suggested are not convenient and would not be effectual. In order to justify the Court in refusing a mandamus the alternative remedy must be against the person to whom the mandamus is sought to be issued, and in the present case the alternative remedy would be against the governing body of Christ's Hospital, not against the Charity Commissioners. The answer to all the suggested alternative remedies would be that the language of the scheme was clear to oust the jurisdiction of the Courts, and to confer on the commissioners statutory jurisdiction to determine the question. If a mandamus against the governors were applied for, or an action for an injunction or a declaration were brought against them, they would claim a discretion to admit, or refuse to admit, a particular candidate, although he might be competent and qualified, and that would be a good answer to the action. Proceedings under the Charitable Trusts Act, 1853, s. 28, must be authorized by the Attorney-General, or must be made by persons interested in the charity, and the school board are not such persons. [He referred to *In re Hodgson's*

School (1); *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (2), and *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (3)]

WRIGHT J. This matter, no doubt, is one of importance; but it really lies in a very narrow compass. Without discussing some of the points that have been raised or suggested, it seems to me that the rule ought to be discharged on two grounds. The first ground rests on the true construction of the 143rd clause of the scheme framed by the Charity Commissioners. It is in these terms: "Any question affecting the regularity or the validity of any proceeding under this scheme shall be determined conclusively by the Charity Commissioners upon such application made to them for the purpose as they think sufficient." Here the Charity Commissioners have dispensed with any particular form of application, because they object to their interference being invoked at all in this matter. The question, therefore, is as to the true construction of the words, "any question affecting the regularity or the validity of any proceeding under this scheme." I do not think it useful or possible to amplify one's reasons for thinking that the present question is not within those words. It seems to me that they refer to what may be shortly, although not quite accurately, indicated by the expression "internal matters." I think that is the natural meaning of the words. Further, it seems to me hardly possible to suppose that it was intended to bind outsiders, such as the School Board for London, to submit themselves to an extraordinary tribunal, a tribunal not of a legal character, and a tribunal from whose decision no appeal lies. Indeed, an appeal is expressly excluded by the very language of the clause, which provides that such question as is indicated "shall be determined conclusively by the Charity Commissioners," and apparently, if they think fit, without any evidence and without any argument. They appear to be complete domini of the procedure.

On the second ground, also, it seems to me that the rule

(1) 3 App. Cas. 857. (2) (1888) 40 Ch. D. 100.
(3) (1874) L. R. 2 H. L., Sc. 347.

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Wright J.

ought to be discharged. There is no doubt that in applications for a mandamus this Court has a discretion, except in cases where the refusal of the application would deprive a party of his legal rights without any other remedy existing whatever. Here I think that there is a more convenient remedy under the Charitable Trusts Act of 1853. Certainly the present Attorney-General, who argued here that the applicants for a mandamus ought to have proceeded under that Act, would not refuse the use of his name upon an application made to him. Also, I see no reason why the matter should not be within the ordinary jurisdiction of the Courts, either by way of injunction or by way of an application for a declaration of the right which the School Board for London claim to have.

For these reasons, I think that the rule must be discharged.

BRUCE J. I am of the same opinion. I think it is extremely doubtful whether clause 143 of the scheme includes a matter such as the present; but even if it does, I am perfectly satisfied that the question could be much more conveniently tried in some other way, and that, therefore, in our discretion we ought to discharge the rule.

Rule discharged.

Solicitor for Charity Commissioners: *Clabon.*
Solicitor for governors of Christ's Hospital: *Beachcroft.*
Solicitor for London School Board: *C. E. Mortimer.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1896
Dec. 19.

LANE *v.* COX.

Landlord and Tenant—Dangerous Condition of Demised Premises—Landlord under no Covenant to Repair—Injury to Person using Premises—Liability of Landlord—Negligence.

A landlord who lets an unfurnished house in a dangerous condition, he being under no liability to keep it in repair, is not liable to his tenant, or to a person using the premises, for personal injuries happening during the term, and due to the defective state of the house.

APPEAL from a judgment of nonsuit.

The defendant was owner of a house which he let unfurnished to a weekly tenant. There were no covenants to repair on the part of either the landlord or the tenant. The plaintiff was a workman, who came upon the premises at the request of the tenant for the purpose of moving some furniture. While so employed the plaintiff was injured owing to the defective state of the staircase in the house. There was evidence that at the time the house was let the staircase was in an unsafe condition. The plaintiff brought this action to recover damages for the injuries he had sustained, and it was tried before the Lord Chief Justice, who entered a nonsuit.

The plaintiff appealed.

1896. Dec. 11. *E. W. Sinclair Cox* (with him *F. Lampard*), for the plaintiff. The defendant let the premises in an unsafe condition and is liable, to a stranger who is injured, for misfeasance in so doing: *Nelson* v. *Liverpool Brewery Co.* (1); *Todd* v. *Flight* (2); *Gandy* v. *Jubber*. (3) Where the defect exists at the time of letting the house, the landlord, in order to avoid liability to a stranger who is injured in consequence of the defect, must have thrown the duty of repairing upon the

(1) (1877) 2 C. P. D. 311.
(2) (1860) 9 C. B. (N.S.) 377; 30 L. J. (C.P.) 21.
(3) (1864) 5 B. & S. 78; 33 L. J. (Q.B.) 151; [and see 9 B. & S. 15].

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tenant. [He cited also *Payne* v. *Rogers* (1) and *Sandford* v. *Clarke*. (2)]

B. F. Williams, Q.C. (with him *F. R. Y. Radcliffe*), for the defendant. The first proposition laid down by Erle C.J. in *Robbins* v. *Jones* (3) covers this case: "A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumbledown house." Apart from liability by contract, there is no case of a stranger who is injured owing to the condition of the premises being held to be entitled to recover against the landlord unless the omission of the landlord creates a nuisance, or there was a duty arising to persons using a highway, or to an adjoining neighbour. Here there was no contract, no nuisance, and the landlord owed no duty to the plaintiff; and without the existence of a duty he cannot be liable for negligence. [He cited *Francis* v. *Cockrell* (4); *Le Lievre* v. *Gould*. (5)]

E. W. Sinclair Cox, in reply.

Cur. adv. vult.

1896. Dec. 19. LORD ESHER M.R. In this case the plaintiff, a workman, brought an action against the owner of a house for injuries sustained by reason of a defect in the staircase of the house. The Chief Justice nonsuited, and against that there is an appeal.

There was evidence that the defendant was owner of the house, but that it was let at the time of the accident to a tenant who was in possession of it. There was evidence that at the time the house was let it was in an unsafe condition. The plaintiff was in the house to remove furniture of the tenant's, and he sustained an injury owing to the defect in the staircase. The question is raised whether the defendant under these circumstances is liable to the plaintiff. There was no contractual relation between the plaintiff and the defendant, and it was not like the case of a person who keeps a shop to which he

(1) (1794) 2 H. Bl. 350.
(2) (1888) 21 Q. B. D. 398.
(3) (1863) 15 C. B. (N.S.) 221, at p. 240.
(4) (1870) L. R. 5 Q. B. 501.
(5) [1893] 1 Q. B. 491.

intends people to come. It is said, however, that the defendant was guilty of negligence which led to the accident because he let the house in a defective condition. It has been often pointed out that a person cannot be held liable for negligence unless he owed some duty to the plaintiff and that duty was neglected. There are many circumstances that give rise to such a duty, as, for instance, in the case of two persons using a highway, where proximity imposes a duty on each to take reasonable care not to interfere with the other. So if a person has a house near a highway, a duty is imposed on him towards persons using the highway; and similarly there is a duty to an adjoining owner or occupier; and, if by the negligent management of his house he causes injury, in either of these cases he is liable. In this case the negligence alleged is the letting the house in an unsafe condition. It has been held that there is no duty imposed on a landlord, by his relation to his tenant, not to let an unfurnished house in a dilapidated condition, because the condition of the house is the subject of contract between them. If there is no duty in such a case to the tenant, there cannot be a duty to a stranger. There was, therefore, no duty on the part of the defendant to the plaintiff, and there could be no liability for negligence, and the nonsuit was right.

LOPES L.J. I am of the same opinion. What is complained of in this case is a defect in the staircase of a house let by the defendant to a tenant. It is said that the lessor is liable for an injury sustained by a workman employed by the tenant. There is no liability either on the landlord or the tenant to put or to keep the demised premises in repair, unless such liability is created between them by contract. No contractual relation in this respect is implied on the letting of an unfurnished house. A landlord who lets a house in a dangerous or unsafe state incurs no liability to his tenant, or to the customers or guests of the tenant, for any accident which may happen to them during the term, unless he has contracted to keep the house in repair. That disposes of this case so far as any liability of the landlord arising out of contract is concerned. But then it is said that the claim of the plaintiff may be grounded on the negligence of

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the defendant. There cannot be a liability for negligence unless there is a breach of some duty; and no duty exists in this case to the tenant, and none can be alleged to strangers. The case differs entirely from those in which property is in a dangerous state by reason of which an injury happens to one of the public on a highway, or to the occupier of an adjoining house. I think the appeal should be dismissed.

RIGBY L.J. concurred.

Appeal dismissed.

Solicitor for plaintiff: *A. Savage Cooper.*
Solicitors for defendant: *Powell & Skues.*

A. M.

1897] Jan. 26.

CALE *v.* JAMES.

Husband and Wife—Summary Jurisdiction—Costs of Summary Proceedings—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict.* c. 39), ss. 4, 5.

By ss. 4 and 5 of the Summary Jurisdiction (Married Women) Act, 1895, any married woman, whose husband shall have been guilty of certain specified kinds of misconduct towards her, may apply to a court of summary jurisdiction for an order under the Act, and the Court may make an order containing various specified provisions for her protection, including (s. 5, sub-s. (*d*)) "a provision for payment by the applicant or the husband, or both of them, of the costs of the Court, and such reasonable costs of either of the parties as the Court may think fit." The solicitor acting for a married woman in an application, which was unsuccessful, to a court of summary jurisdiction for an order under the Act, brought an action for his costs against the husband. The court of summary jurisdiction had not made, or been asked to make, any provision for the costs:—

Held, that the action could not be maintained, because the Act intended to exclude any remedy in respect of costs other than that specified in s. 5, sub-s. (*d*).

APPEAL from the Birmingham County Court.

The plaintiff acted as solicitor for the defendant's wife in the matter of two applications made by her for orders against the defendant under ss. 4 and 5 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground that he had been

guilty of persistent cruelty to her, and had by such cruelty caused her to leave and live separately and apart from him. The court of summary jurisdiction made no order on either application; and no provision for the payment of costs under s. 5, sub-s. (*d*) (1), was made by that Court or asked for by the plaintiff or the wife. The plaintiff subsequently sued the defendant in the county court for his costs as the wife's solicitor in the matter of the two applications.

The county court judge gave judgment for the plaintiff for his costs, subject to taxation, and the defendant appealed to a Divisional Court.

Lochnis, for the appellant. The Act of 1895 creates a new tribunal with new powers, and the rights of persons who seek the aid of that tribunal are intended to be limited strictly by the Act. No action will lie for these costs. The only mode of recovering them was by application to the court of summary jurisdiction, and no such application was made.

McCardie, for the respondent. Sect. 5 only applies where an order has been made under s. 4 in favour of the wife, so that in this case the court of summary jurisdiction could not have made an order for costs. Further, s. 5, sub-s. (*d*), only applies to the actual parties to the application before the Court, and does not apply to the solicitor of one of them. Neither

(1) The Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39):—

By s. 4: Any married woman whose husband shall have (inter alia) been guilty of persistent cruelty to her, ... and shall by such cruelty have caused her to leave and live separately and apart from him, may apply to a court of summary jurisdiction for an order or orders under this Act.

Sect. 5: "The court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz.:—

"(*a.*) A provision that the applicant be no longer bound to cohabit with her husband . . . .;

"(*b.*) A provision that the legal custody of any children of the marriage . . . . while under the age of sixteen years be committed to the applicant;

"(*c.*) A provision that the husband shall pay to the applicant . . . . such weekly sum not exceeding 2*l.* as the Court shall, having regard to the means both of the husband and wife, consider reasonable;

"(*d.*) A provision for payment by the applicant or the husband, or both of them, of the costs of the Court and such reasonable costs of either of the parties as the Court may think fit."

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the wife nor the solicitor could have obtained these costs before the justices, and he is not precluded from his remedy by action. (1)

WRIGHT J. This is a case of importance and difficulty. I have come to the conclusion that the Legislature in passing the Summary Jurisdiction (Married Women) Act, 1895, did not intend that in cases under that Act proceedings for the costs, involving further expense, might be taken in another court. It was not intended that, having made it possible to make the application for costs to a court of summary jurisdiction, an action for costs should be maintainable in any other court. The Act intends that all questions as to costs shall be dealt with by the court of summary jurisdiction, and uses language which strongly indicates that intention. It leaves the Court perfectly free to make any order as to costs it may think fit against either the wife or the husband. It may, no doubt, be argued that the provision found in s. 5 (*d*) does not prejudice the right of the married woman's solicitor to recover his costs against the husband before another tribunal. That question turns on the true construction of the Act, and it cannot, I think, be denied that the solicitor's rights are derivative. If it be true to say that the Act intends that all costs should be paid according to the direction of the court of summary jurisdiction, we ought, in my opinion, to hold that the provision binds the solicitor as well as the wife. I do not decide the other questions raised in the course of the argument because the facts necessary to enable us to decide them satisfactorily have not been sufficiently found.

BRUCE J. I am of the same opinion. The Act in question gives a summary procedure for the benefit of married women, the object being to enable poor persons to obtain without any great expense the protection which formerly they could only

(1) It is thought unnecessary to state the arguments and authorities cited on the question whether the costs of conducting the unsuccessful proceedings by the wife were "necessaries" in respect of which the solicitor could recover against the husband, as the Divisional Court did not decide that question.

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obtain by more expensive proceedings. The Act gives the court of summary jurisdiction full power to deal with all costs; and it is, in my opinion, only reasonable to suppose that the Legislature intended that the question of costs should be dealt with exclusively by that Court. I therefore come to the conclusion that an action will not lie to recover costs incurred in respect of applications under the Act. That is the ground of my decision. Looking at the facts as they appear in the county court judge's notes, I think there is not enough stated to justify us in deciding the other questions which have been raised. I am of opinion that the appeal should be allowed.

Appeal allowed. Leave to appeal refused.

Solicitors for appellant: *T. A. Dennison & Co., for Seymour, Price & Adcock, Birmingham.*

Solicitors for respondent: *Tippits & Son, for Edward Eadon, Birmingham.*

W. A.

VENNER *v.* M'DONELL.

1896
Dec. 15.
1897
Jan. 15.

London — Building Notice — Temporary Erection — "Structure" — London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 145.

By s. 145 of the London Building Act, 1894, "Where a building or structure or work is about to be begun . . . . the builder or other person causing or directing the work to be executed shall serve on the district surveyor a building notice respecting the building or structure or work."

The owners of a certain large building situate in London called the Agricultural Hall, which was used for the purpose of public exhibitions or shows, were possessed of certain moveable seating consisting of tiers of wooden platforms and capable of accommodating upwards of 3000 persons, which seating they from time to time erected for the accommodation of the spectators at such of the exhibitions as required it:—

Held, that such seating was not a "building structure or work" within the meaning of the above section; and that the owners of the hall were not thereby required to serve a building notice on the district surveyor upon each occasion on which they re-erected the seating.

CASE stated by a metropolitan police magistrate.

The appellant appeared on June 25, 1896, to answer an information laid by the respondent, the district surveyor under the

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London Building Act, 1894, for the district of South West Islington, charging that the appellant did, on May 26, 1896, at the Royal Agricultural Hall, in the said district, without notice to the respondent, begin to execute a work respecting which the appellant ought to have served a building notice before commencing it, contrary to the provisions of the said Act. (1)

The Royal Agricultural Hall is a public building, containing a hall of a superficial area of 82,728 square feet. Along each side of the hall there is a gallery supported by iron columns. The said hall and galleries were erected some years before the commencement of the London Building Act, 1894. The hall belongs to a company, of which the appellant is the manager, and by which it is let for the purpose of holding exhibitions and shows, most of which are of annual recurrence. For certain of the shows, such as the annual horse-shows and the annual Royal Military Tournament, seating is required for the convenience of the spectators; while for other shows, such as dog-shows, dairy-shows, and cattle-shows and trade exhibitions, no seating is required. The company accordingly, for the pur-

(1) By s. 78 of the London Building Act, 1894, "Notwithstanding anything in this Act every public building including the walls roofs floors galleries and staircases and every structure and work constructed or done in connection with or for the purposes of the same shall be constructed in such manner as may be approved by the district surveyor or in the event of disagreement may be determined by the tribunal of appeal."

"No public building shall be used as such until the district surveyor or the tribunal of appeal shall have declared his or their approval of the construction thereof."

"After the district surveyor shall have so declared his approval or shall certify that it has been constructed as directed by the tribunal of appeal any work affecting or likely to affect the building shall not be done to in or on the building without the approval of the district surveyor or such certificate as aforesaid."

By s. 84, "(1.) No person shall set up in any place any wooden structure (unless it be exempt from the operation of this part of this Act) except hoardings inclosing vacant lands and not exceeding in any part twelve feet in height without having first obtained for that purpose a licence from the council."

By s. 145, "In the following cases and at the following times, that is to say:—

"(*a*) Where a building or structure or work is about to be begun then two clear days before it is begun:

the builder or other person causing or directing the work to be executed shall serve on the district surveyor a building notice respecting the building or structure or work."

poses of its business, caused seating to be constructed some years ago of such a description that it could be placed in position when required, and when not required could be taken down and stored. The placing in position of this seating upon the occasion of the Royal Military Tournament that took place in the hall in May, 1896, was the work the omission to give notice of which to the district surveyor was the subject of the information. The seating, which consists of tiers of wooden platforms, occupies a superficial area of 17,240 square feet, and is arranged to seat over 8000 persons. Every platform and post of which the seating consists is so numbered that when replaced, after having been taken down, it can be placed in the same position as that which it occupied before being taken down. No support is afforded to the hall or any part of it by any portion of the seating, and the taking down of the seating when not required, and the replacing of it when required, in no way affects or is likely to affect the hall.

In support of the information it was contended that whenever the seating was erected and replaced work was thereby done in connection with or for the purposes of the hall within the meaning of s. 78 of the London Building Act, 1894, and that the appellant should have served in respect of such work the notice required by s. 145, and that the appellant, having neglected to serve such notice, had rendered himself liable to the penalty prescribed by s. 200, sub-s. 11 (*b*), of the said Act.

On behalf of the appellant it was contended that the work contemplated by s. 78 was either work done to a public building during its construction, or, where the work was done after the building had been constructed, work affecting or likely to affect the building, and that as the seating in question was neither one nor the other notice to the district surveyor previously to replacing it was not required by the Act.

The magistrate, being of opinion that the erection of the seating on May 26, 1896, was work done in connection with a public building for the purpose of seating the spectators and required the approval of the district surveyor, convicted the appellant subject to a case for the opinion of the Court.

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Macmorran, Q.C., and *R. C. Glen*, for the appellant, having stated the question, were stopped by the Court.

Avory, for the respondent. The seating in question is a structure or work within the meaning of s. 145. What is a structure within that section is a question of degree. An awning erected outside a house for the purposes of a ball would not be a structure. But here the seating is very large, being capable of accommodating more than 3000 persons. The fact that it is erected under cover can make no difference. But if it is not a structure it is at all events a work.

Macmorran, Q.C., in reply. The language of s. 145 seems to suggest that a notice is only required with reference to erections which by virtue of some other sections in the Act would be within the jurisdiction of the district surveyor. The only sections under which it could be contended that he had such jurisdiction are ss. 78, 84. The first of those sections deals with structures or works constructed or done "in connection with a building," which means at the time of the erection of the building; and that was not the case here. Nor does the latter section, s. 84, which prohibits the erection of temporary wooden structures without the licence of the council, apply to this seating, for the structures there referred to are substantive structures and not mere internal fittings of a building. In *Hall* v. *Smallpiece* (1) it was held that a steam roundabout and shooting-gallery were not "wooden structures or erections of a moveable or temporary character" within the meaning of one of the Metropolitan Building Acts. And in *London County Council* v. *Humphreys, Limited* (2), the same was held of a bungalow erected for exhibition and sale and not intended to be occupied in connection with the site on which it was erected.

Cur. adv. vult.

1897. Jan. 15. The judgment of the Court (Wills and Wright JJ.) was read by

WILLS J. The information in this case charges that the appellant at the Royal Agricultural Hall did without notice to

(1) (1890) 59 L. J. (M.C.) 97. (2) [1894] 2 Q. B. 755.

the district surveyor begin to execute a work respecting which the appellant ought to serve a building notice before commencing such work, contrary to the provisions of the London Building Act, 1894.

By s. 200, sub-s. 11 (*b*), any person who being a person who ought to serve a building notice begins to execute a work, respecting which he ought to serve a building notice, before serving such notice shall be liable to a penalty. By s. 145, where a building or structure or work is about to be begun, then two clear days before it is begun the builder or person causing the work to be done shall serve a building notice on the district surveyor. If a building notice was necessary in the present case, the appellant was the person who ought to have given it, and he did not give it before the work was begun. The only question, therefore, is whether the erection or construction with which the case is concerned was or was not a "building structure or work" within the meaning of s. 145 of the London Building Act, 1894.

The Agricultural Hall is a large building constructed for the purpose of shows and exhibitions of various kinds. It is surrounded on the inside by galleries and staircases which are permanent. Some of the exhibitions require that the galleries should be occupied by sittings for the spectators, others require that there should be no seats, or seats only in portions of the gallery. The iron columns which permanently support the roof and galleries have sockets attached to them, and the temporary and moveable timbers to which the seats are for the time being screwed or bolted are dropped or let into these.

It is obvious that if the expression "structure or work" is to receive what, apart from the subject-matter to which it is applied, would be its natural meaning, no person within the jurisdiction of the London County Council could repair his roof, or mend his windows, or put up a fixed cupboard in his bedroom, or a fitted bookcase in his library, or a new kitchen-range, or introduce gas, water, or electric light into his house, without giving notice to the district surveyor, and without being subject (s. 138) to his supervision, nor without in the case of even the most trivial matters paying him half of the fee to which he

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would be entitled on the original construction of the house or building to or on which any addition, alteration, or other work was made or done (Sched. III., Part I.). It seems impossible to suppose that interference so constant, vexatious, useless, and costly with the daily life of a great community can have been intended; and we are therefore driven to the conclusion that some limitation must be put upon the natural meaning of "structure or work." It is therefore necessary to construe "structure or work" as meaning in s. 145 something of the same general nature and character as a building. No other limitation appears possible. This view receives confirmation from s. 146, which shews the object of supervision by the district surveyor and his duties in respect thereof. He is from time to time to "survey any building or work hereby placed under his supervision and cause all such provisions and by-laws (namely, the provisions of this Act and the by-laws made thereunder) to be duly observed." There are no by-laws applicable to such erections as this temporary seating, and no power to make them (see s. 164). It has been argued that s. 78 and Part VII. (ss. 82–86) contain "provisions" applicable to such an erection. The Agricultural Hall was built or in use when the Act of 1855 (18 & 19 Vict. c. 122) was in force. Sect. 30 of that Act corresponds to s. 78 of the Act of 1894, but it does not contain the words "and every structure or work constructed or done in connection with or for the purposes of the same." We think it plain, however, that the Act of 1894 is not retrospective; that the approval of the surveyor there made a condition precedent to the use of the building as a public building refers to an approval to be given at the outset once and for all; and that afterwards the only part of the section which could apply is the last clause, which says that no work likely to affect the *building* shall be done to or on the building without approval. We do not think this is work done to or on the building, and if it were it is not suggested that it is likely to affect it. As to Part VII., the two material sections are ss. 82 and 83. The reasons we have given for saying that in s. 145 by "structure or work" is meant something in the nature of a building apply with greater force to

s. 82. In addition, it is to be observed that where the builder is desirous of erecting a "building or structure" which comes within that section, the plan he has to deliver with his application is described merely as a "plan of the proposed building," and it is the "building" that is there to be erected if the council are satisfied. As to s. 83, there may be reasons for giving in some cases a more extended meaning to the term "structure," because in Sched. III., Part I., where the fees payable to the surveyor are defined, it is clear that it is assumed that he may be entitled to a fee not only in respect of "any wooden structure," but of "any structure or erection put up on any public occasion." This extension of the fee to erections put up on public occasions must refer to s. 83, which is the only one dealing specially with "structures of a temporary character," and it therefore gives a reason for saying that erections put up on public occasions may (not must) come under the description of "structures" in s. 83. Such an extension of the word "structure" in s. 83, however, has no application to the present case, where the construction in question has no reference to any public occasion. As, therefore, neither s. 78 nor ss. 82 and 83 apply to such an operation as that of replacing the seating in the Agricultural Hall, there is no provision in the Act and no by-law the observance of which the district surveyor has under s. 146 to secure.

The necessity in this act of applying to the word "structure" the principle "noscitur a sociis" is well illustrated by s. 164, which gives power to the London County Council to make by-laws for (amongst other things) "the regulation of lamps, signs or other structures." In a building Act one certainly would not, but for the context, have supposed that a lamp would fall under the designation of a "structure." It is impossible to give any general definition of "structure" to be applied everywhere throughout the Act. If it had been possible, the definition clause would have been the appropriate place and Parliament the appropriate authority to give it. We must in each case consider the particular enactment which has to be applied, and see as we best can whether the nature of the provisions bearing upon the question justify the application sought

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to be made. In Part III., for instance, there seem to be very good reasons for giving a wide meaning to the word "structure." It is difficult to imagine anything affixed to the ground which ought to be erected (without the permission of the council) so as to project beyond the general line of buildings. The whole object of the legislation in this respect is to preserve uniformity, and that object can only be secured by putting everything which could interfere with it under the control of the council. Some "structures and erections put up on any public occasion" are clearly intended to be subject to the jurisdiction of the council and the district surveyor (see Sched. III., Part I.). From the very nature of the occasions on which they come into existence, many of them—probably most of them—must be in or in the neighbourhood of streets, and more or less in the nature of public nuisances. The 3rd schedule, as has been pointed out, enlarges the expression "structure" in the Act by tacking on to it in the schedule the words "erection put up on any public occasion." Whether any particular erection put up on such an occasion requires notice or inspection must be determined when the occasion arises. The illustrations given shew that the expression "structure" must be dealt with in each case according to the facts and the particular enactments sought to be applied. It is clear from Sched. III., Part I., that "erections put up on any public occasion" must come somewhere under the word "structure" in the Act, else there would be nothing for them to operate upon. This is a very good reason for saying that in s. 83 such erections may legitimately be considered to fall within the word "structure." It is no reason for a similar extension of the word in s. 145, inasmuch as s. 83 contains within itself every provision necessary for the full control of the works by the council, and for the protection of the public. Again, in s. 201 (1) "building" and "building or structure"

(1) By s. 201, "The following buildings and works shall be exempt from the operation of Parts VI. and VII. of this Act:—

"(8.) Any building . . . . belonging to a canal company and used exclusively for the purposes of canal works under any Act of Parliament;

"Any building or structure situate upon the railway . . . . and used for

appear to be used as synonymous. It is impossible to conceive any reason for giving a different measure of exemption to railway companies and dock companies on the one hand, and to canal companies and Conservators of the Thames on the other hand. The enactments which we have thus called attention to illustrate the impossibility of defining "structure" once for all in the Act, and we are not going to attempt more than to deal with the particular case now before us. As to that, we are satisfied that the replacing of the seats in question is not "the beginning of a structure" within s. 145, and that the appeal ought to be allowed.

Appeal allowed.

Solicitors for appellant: *Kingsford, Dorman & Co.*
Solicitor for respondent: *Blaxland.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1897
Jan. 29.

MARTIN *v.* MARTIN & CO.

Practice—Consolidation of Causes—Application by Plaintiff—Order XLIX., *r.* 8.

An application under Order XLIX., r. 8, to consolidate causes pending in the same Division, may be made by the plaintiff.

APPEAL from an order of a judge at chambers directing that two causes pending in the Queen's Bench Division should be consolidated.

The plaintiff brought an action against the defendants for not delivering certain shares according to contract. The defendants, among other defences, pleaded that their liability, if any, had been satisfied by the delivery to the plaintiff of a bill of exchange accepted by the defendants and payable six

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the purposes of or in connection with the traffic of a railway company;

"Any building belonging to the Conservators of the River Thames and used by them as a workshop or store;

"(9.) Any building or structure .... belonging to a dock company constituted by Act of Parliament and situate within the dock premises."

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months after date, and that the plaintiff accepted the same in discharge of his claim. At that time the six months had not expired, but subsequently the bill of exchange matured and was dishonoured. The plaintiff thereupon commenced another action against the defendants for the same causes of action as those set out in the first action, and alternatively for the amount due on the dishonoured bill.

An order of a master relating to security for costs came before Cave J. on appeal; and at the hearing the plaintiff asked that the actions should be consolidated. The learned judge made an order to that effect. The defendants appealed.

1897. Jan. 25. *Henry Kisch*, for the defendants. The order was made without jurisdiction, for Order XLIX., r. 8 (1), continues the practice in force before the Judicature Acts, which was that an order for consolidation was only made on the application of the defendant.

Ashton Cross, for the plaintiff.

Cur. adv. vult.

1897. Jan. 29. LORD ESHER M.R. In this case there were two actions between the same parties—one for the non-delivery of certain shares, and the other on a bill of exchange. Cave J., on the application of the plaintiff, ordered that the actions should be consolidated; and against this order there is an appeal on the ground that there is no rule which justified its being made.

The question turns on Order XLIX., r. 8, by which "causes or matters pending in the same Division may be consolidated by order of the Court or a judge in the manner in use before the commencement of the principal Act in the superior courts of common law." It is said that before the time named such an order for consolidation was never made on the application of the plaintiff. That practice was known to those who made the rule, and nothing would have been easier than to say that an

(1) Order XLIX., r. 8: "Causes or matters pending in the same Division may be consolidated by order of the Court or a judge in the manner in use before the commencement of the principal Act in the superior courts of common law."

order for consolidation should only be made at the instance of the defendant. That is not what the rule says, and the only condition to be found in it is that the causes are to be in the same Division. But then it is said that the rule provides for the making of such an order "in the manner in use before the commencement of the principal Act," and that this means that the practice in force before the Judicature Acts is to be continued. In my opinion that is not so, and what is required is that if an order is made it should be treated in the same manner as before. I think it is a wholesome and useful reading of this rule to treat it as leaving the making of an order for consolidation to the discretion of the judge at chambers, with power to make such an order as has been made in this case. The object of the rule was to do away with waste of time and money, and to carry out this object I should desire to give the rule as large a scope as we can. I think that the appeal ought not to succeed, and that the order of the learned judge should stand.

LOPES L.J. No doubt under the old system actions could not be consolidated at the instance of the plaintiff. I suppose the reason was that it was thought that the plaintiff was master of the situation so far as bringing a number of actions is concerned, and that the defendant was passive in this matter; so that so far as he is concerned it was reasonable to assist him in the consolidation of actions brought against him. What we have to consider is the effect of Order XLIX., r. 8, and I am not prepared to say that there is anything in that rule which limits the class of persons by whom the application may be made to defendants. It is not expressed in the rule that the application can only be made by a defendant; and that being so, I think it wiser to give the rule a large bearing, leaving it to the discretion of the judge to say whether its application in any particular case is expedient and proper.

CHITTY L.J. The object of this rule was to save expense, and I think it ought to have as large an application as the words of it will reasonably admit. Taking the words as they

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Chitty L.J.

stand, they are only limited by the provision that the actions which it is desired to consolidate should be in the same Division, and other rules supply any defect that there might be in the power to consolidate by permitting the transfer of causes from one Division to another. There is nothing in the rule either express or implied limiting the right to make the application to the defendant. No doubt it was formerly the rule that a plaintiff could not apply for consolidation where the word is used not to indicate the singling out of one of several actions and the staying of proceedings in the others till that one has been tried, but to denote the combination of actions so that thereafter they proceed as one action. It cannot be suggested that when the trial of the actions consolidated in this manner comes on, the judge has no power to sever the case before him into its component parts for all purposes of justice whether in the matter of costs or otherwise. Consequently no injustice can follow from the order made in this case.

In my opinion the construction put by the Master of the Rolls on the expression "in the manner in use before the commencement of the principal Act" is the right one, and those words do not import that the plaintiff shall not be an actor in obtaining an order to consolidate.

Appeal dismissed.

Solicitors for plaintiff: *Gibson, Weldon & Bilbrough.*

Solicitors for defendants: *Goldberg, Langdon, Barrett & Newall.*

A. M.

THE QUEEN *v.* JUSTICES OF LONDON.

1897
Jan. 18.

Poor-rate—Valuation List—Notice of Objection—Jurisdiction of Assessment Committee—Union Assessment Committee Act, 1862 (25 & 26 *Vict. c.* 103), *ss.* 18, 19.

The effect of s. 19 of the Union Assessment Committee Act, 1862, is that, upon the hearing by an assessment committee of an objection to a valuation list, the scope of the inquiry is, in the absence of the consent of the parties supporting the valuation list, limited to the grounds of objection specified in the notice of objection.

Ratepayers, who objected to the amount at which their hereditaments were assessed in a valuation list, gave notice of objection to the rateable value thereof appearing in the list, but they did not give any notice of objection to the gross value appearing therein:—

Held, that, in the absence of the consent of the overseers, the assessment committee had no jurisdiction to entertain any objection to the gross value.

RULE for a mandamus to the quarter sessions of the county of London to hear and determine an appeal against a valuation list. In the valuation list for the parish of St. John at Hackney, in the Hackney Union, made in the year 1895, the East London Waterworks Company were assessed at 20,000*l.* gross and 15,223*l.* rateable value in respect of certain hereditaments occupied by them. On or about June 24, 1895, the company gave to the assessment committee of the Hackney Union and to the overseers of the parish of St. John notice of objection to the assessment of 15,223*l.* rateable value in the said list, and by such notice claimed that it should be reduced to 13,170*l.*, but made no objection to and claimed no reduction of the gross value stated in such list. At the hearing of the said objection by the assessment committee the company claimed to have the gross value reduced as well as the rateable value. The overseers who appeared at the hearing did not consent to the assessment committee entertaining the company's objection to the gross value. The assessment committee finally determined the gross and rateable values appearing in the valuation list to be respectively correct. The company then gave notice of appeal to the quarter sessions, and in their notice they stated that the

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correction they desired to have made in the valuation list was to reduce the gross value from 20,000*l.* to 17,516*l.*, and the rateable value from 15,223*l.* to 13,138*l.* At the hearing before the quarter sessions the assessment committee, being the respondents on the appeal, contended that it was not open to the appellants to object to the gross value. The justices refused to receive any evidence to show that the assessment of the gross value was excessive. A rule having been obtained on behalf of the East London Waterworks Company calling on the justices of the county of London to shew cause why they should not hear and determine the merits of the appeal,

Ryde (*Balfour Browne, Q.C.*, with him), for the assessment committee, shewed cause. The question arises under s. 32 of the Valuation (Metropolis) Act, 1869, by which any ratepayer "who may feel aggrieved by any decision of the assessment committee" may appeal to the quarter sessions. By s. 7 of that Act, after the valuation list is signed by the overseers, the same proceedings shall be had as are directed by ss. 17–21 of the Union Assessment Committee Act, 1862. (1) By s. 18 of the latter Act any ratepayer who is aggrieved by a valuation list is to "give to the committee and the overseers a

(1) By s. 18 of the Union Assessment Committee Act, 1862, "Any person who may feel himself aggrieved by any valuation list .... may .... give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof."

By s. 19, "Where a meeting is holden for hearing objections to the valuation list of any parish the committee shall not hear any objection to such valuation list unless such notice as aforesaid of such objection have been given to the committee and to the overseers .... except where the overseers by themselves or any other person on their behalf .... consent to the hearing of such objection, and in such case the committee may, if they see fit, hear the same."

By s. 1 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), the Union Assessment Committee Act, 1862, therein referred to as "the principal Act," is incorporated therewith.

By s. 7, "After the valuation list is signed by the overseers the same proceedings shall be had as are directed by ss. 17, 18, 19, 20, and 21 of the principal Act, subject to the alterations made by this Act."

By s. 32, "Any ratepayer .... who may feel aggrieved by any decision of the assessment committee on an objection made before them to which he was a party .... may appeal against such decision to the assessment sessions" (now the quarter sessions for the county of London: 51 & 52 Vict. c. 41, s. 42, sub-s. 10).

notice in writing of his objection specifying the grounds thereof"; and by s. 19 the committee is to hold meetings for hearing objections; but "the committee shall not hear any objection to such valuation list unless such notice as aforesaid of such objection have been given to the committee and to the overseers . . . . except where the overseers . . . . consent to the hearing of such objection." That not only precludes the committee from entertaining an objection where no notice of objection at all has been given, but also precludes them, where a notice of objection has been given, from entertaining any ground of objection not specified in the notice. No notice of objection having been given as to the gross value, the committee, in the absence of the consent of the overseers, had no power to give any decision upon the objection to the gross value, and did not in fact give any such decision. Therefore there was nothing to appeal from. An objection to the rateable value does not necessarily involve an objection to the gross value. The ratepayer may admit the gross value and object only to the amount of deductions in respect of repairs. And there is no necessary proportion between the gross and rateable values: especially in the case of waterworks which fall within class 10 in the 3rd schedule to the Act of 1869, in respect of which class there is no maximum rate of deduction. There is nothing in law to prevent the gross value of waterworks being 100,000*l.* and the rateable value 2000*l.*

Cripps, Q.C., and *Barnes* (*Littler*, Q.C., with them), in support of the rule. Notice of objection to the rateable value includes a notice of objection to the gross value, for rateable value is the gross value less a certain deduction. But even if the notice of objection was informal, the committee in fact went into the question of the gross value, and thereby waived the informality. They ought, therefore, to be estopped from raising the point on the appeal to which they are the respondents. The service of notice of objection is not a condition precedent to the right to have the objection heard. In *Park Gate Iron Co.* v. *Coates* (1) it was held that the provisions of a county court Act which required the party appealing from the decision of a

(1) (1870) L. R. 5 C. P. 634.

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county court judge to give notice of appeal and security for costs within ten days were not conditions precedent to the jurisdiction of the Court to hear the appeal.

WRIGHT J. In my opinion this rule must be discharged. The question arises primarily under s. 32 of the Valuation (Metropolis) Act, 1869, which provides that "any ratepayer . . . . who may feel aggrieved by any decision of the assessment committee on an objection made before them to which he was a party . . . . may appeal against such decision to the assessment sessions," now the quarter sessions. In this case the East London Waterworks Company, who are ratepayers, purport to have appealed against an alleged decision of the assessment committee upon both the gross and rateable values of the hereditaments in question. What we have to decide is whether there was in point of law any decision by the assessment committee upon the gross value.

Now it appears that the waterworks company, when the valuation list had been deposited, sent in a notice of objection which specified an objection only to the rateable value. By the Union Assessment Committee Act, 1862, which is incorporated with the Valuation (Metropolis) Act, 1869, it is provided that any person who may feel himself aggrieved by any valuation list may give to the committee and to the overseers "a notice in writing of his objection specifying the grounds thereof" (s. 18); and that "the committee shall not hear any objection to such valuation list unless such notice as aforesaid of such objection have been given to the committee and to the overseers," except where the parties opposing the objection consent to the hearing of the objection (s. 19). And, further, by s. 11 of the Valuation (Metropolis) Act, 1869, "the notice of objection shall specify the correction which the objector desires to be made." Primâ facie, then, the assessment committee, owing to the insufficiency of the notice, had no power to entertain the question of the gross value. They could only derive that power from the consent of the overseers. Unless the overseers did so consent to the gross value being gone into, and unless the committee being given jurisdiction by such consent did in

fact go into the question of the gross value, there was no "decision of the assessment committee" upon the question of the gross value from which an appeal could be brought to the quarter sessions. It was said that when the matter came before the assessment committee, the committee without objection on the part of anybody entertained the matter and decided it. But in my opinion the evidence is insufficient to establish that they did so. I think that they did nothing more than simply discuss the question whether they could entertain the matter. But, further, even if they did entertain it, there was no evidence that the overseers consented to their doing so; and therefore their decision would have been without jurisdiction, and would not have been an appealable decision within the meaning of s. 32 of the Act of 1869.

BRUCE J. I agree. The evidence is not sufficient to satisfy me that the assessment committee did in point of fact decide any question as to the gross value. But, apart from that, I think that, on the construction of s. 32 of the Valuation (Metropolis) Act, 1869, where that section speaks of an appeal by a party "aggrieved by any decision of the assessment committee on an objection made before them," it means a decision on an objection taken in the formal way provided by that Act and the Act incorporated therewith—that is to say, on an objection formally specifying the grounds of objection and the correction which the objector desires, except in a case in which there is an express waiver by the other side of the insufficiency of the notice of objection. And here there is no evidence to satisfy me that there was any express waiver of such insufficiency by the overseers.

Rule discharged.

Solicitors for prosecutors: *Bircham & Co.*

Solicitors for assessment committee: *Stones, Morris & Stone.*

J. F. C.

1897
Jan. 29.

THE GUARDIANS OF THE POOR OF THE ST. OLAVE'S UNION, APPELLANTS *v.* THE GUARDIANS OF THE POOR OF THE CANTERBURY UNION, RESPONDENTS.

Poor Law—Settlement—Irremovability—Patient in Hospital—The Poor Removal Act, 1846 (9 & 10 *Vict. c.* 66), *s.* 1—*Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

The period during which a person is a patient in a hospital must be excluded in computing the time necessary for his acquisition of a settlement under the Divided Parishes Act, 1876.

CASE stated by the recorder of Canterbury.

On April 1, 1896, Edward James Farr, aged nine years, became chargeable to the respondent union. Edward James Farr was the lawful son of Arthur and Ellen Farr, and was born on April 1, 1887, in the Greenwich Union.

Ellen Farr died on June 22, 1888, and in 1889 Arthur Farr sent Edward James Farr to reside with a relative in the respondent union. He remained with this relative in the respondent union until he became chargeable.

Arthur Farr never intended that the absence of Edward James Farr should be permanent, nor did he ever abandon or relinquish his right as father to the custody and control of Edward James Farr. He, however, contributed nothing towards his support, and only saw his son once during this period.

Arthur Farr went to reside in the appellant union on July 23, 1892, and continued to have his residence and his house in that union until his death on April 15, 1896.

On May 1, 1895, Arthur Farr was admitted into the Brompton Hospital for Consumption outside the appellant union, and remained there till the end of June, when he went to a convalescent home at Sandgate (also outside the appellant union), where he remained till July 29, 1895. On that day he returned to his house in the appellant union, and remained there until his death. He went to the hospital and convalescent home,

intending to return to his house in the appellant union so soon as he was well enough to do so, and during his absence his second wife remained in his house and kept the home together.

In March, 1896, application was made to Arthur Farr by his relative to take Edward James Farr back, and he then expressed his wish to have the boy back, but stated that he was unable to do so on account of his illness. The relative accordingly sent the boy to the respondents' workhouse.

On April 24, 1896, two justices for the city of Canterbury made an order for the removal of Edward James Farr from the respondent union to the appellant union, on the ground that he was legally settled in that union.

From this order the appellant union appealed to quarter sessions, contending that Edward James Farr resided from April, 1889, until April 1, 1896, in the respondent union under such circumstances as to gain for him a status of irremovability in his own right in that union; and, further, that Arthur Farr had not at the time of his death acquired a settlement in the appellant union by reason of his absence from that union during the months of May, June, and July, 1895. The recorder held that Arthur Farr had acquired a settlement in the appellant union, and that Edward James Farr had not become irremovable in the respondent union, and confirmed the order of the justices.

Macmorran, Q.C., and *Harper*, for the appellant union. Edward James Farr had acquired a settlement in the respondent union by virtue of his physical residence within it from April, 1889, to April, 1896. A settlement can be acquired, where both parents are dead, by a child under the age of emancipation: *Highworth and Swindon Union* v. *Westbury-on-Severn Union*. (1)

Secondly, Arthur Farr had not acquired a settlement in the appellant union, since by 9 & 10 Vict. c. 66 (2), the time during

(1) (1889) 14 App. Cas. 465.

(2) By 9 & 10 Vict. c. 66, s. 1, "No person shall be removed nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years (reduced to one year by 28 & 29 Vict. c. 79) next before the application for the warrant: Provided always, that the time during which such

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which a person shall be a patient in a hospital shall be excluded in the computation of the time for acquiring a settlement. In order to acquire a settlement by residence there must have been a residence for three consecutive years under such conditions in each of such years as would have created a status of irremovability: Divided Parishes Act, 1876, s. 34; *Dorchester Union* v. *Weymouth Union*. (1) Excluding the time Arthur Farr was in the Brompton Hospital and the convalescent home, he did not reside for three consecutive years in the appellant union.

Joseph (*Hohler* with him), for the respondent union. Edward James Farr could not acquire a settlement while he was unemancipated: *West Ham Union* v. *St. Matthew, Bethnal Green*. (2)

The proviso in s. 1 of 9 & 10 Vict. c. 66, only applies where a person is confined in a hospital as if he were a lunatic. It does not refer to ordinary residence in a hospital as a patient.

WRIGHT J. It seems to me that Mr. Macmorran is right on his second point. That turns entirely on the construction to be put on the proviso in s. 1 of 9 & 10 Vict. c. 66. It is conceded that the father, Arthur Farr, had resided for a sufficient time in the appellant union to have acquired a settlement there under s. 34 of the Divided Parishes Act, 1876, if the period which he spent in the hospital be not struck out. We are bound by the decision in *Dorchester Union* v. *Weymouth Union* (1) to hold that the requisite conditions must have existed in each of the three years of residence. Whether the Court of Appeal

person shall be a prisoner in a prison, or shall be serving Her Majesty as a soldier, marine, or sailor, or reside as an in-pensioner in Greenwich or Chelsea hospitals, or shall be confined in a lunatic asylum or house duly licensed or hospital registered for the reception of lunatics, or as a patient in a hospital . . . . shall for all purposes be excluded in the computation of time hereinbefore mentioned."

By s. 34 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), "Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable, he shall be deemed to be settled therein. . . ."

(1) (1885) 16 Q. B. D. 31.

(2) [1894] A. C. 230.

would think so, having regard to *Hartfield* v. *Rotherfield* (1), I do not know; but the decision as it stands is binding upon us. It seems to me that the period in which Arthur Farr was in the hospital must be struck out. The section no doubt is clumsily drawn. Grammatically construed, it would read "the time during which such person . . . . shall be confined . . . . as a patient in a hospital" is to be excluded in the computation of time. It is contended that that must mean something more than ordinary residence in a hospital. But the cases of the confinement of lunatics are specifically provided for by the section, and there are no other hospitals in which patients can be confined. I think, therefore, that we must read the section as though the words "or as a patient in a hospital" were governed by the words "shall reside," and that no meaning can be given to the words "shall be confined" in this connection. The idea of the Legislature was no doubt to exclude from the computation of the time any period during which the person was not maintaining himself, but was living at the expense of others. Taking that view of the section, and excluding the period that Arthur Farr was in the hospital, it becomes clear that he had not acquired a settlement in the appellant union within the meaning of the decision in *Dorchester Union* v. *Weymouth Union*. (2)

The other point raised by the case is an even more difficult one, but it becomes unnecessary to decide it now. On the whole, I do not think the appellants could succeed upon it. It is difficult to see how an unemancipated child can be regarded as having acquired a settlement for himself in the respondent union while his father was alive and residing in another union. I think that the case of *West Ham Union* v. *St. Matthew, Bethnal Green* (3), is an authority against such a proposition. However, as I have said, it seems unnecessary to consider it, since our judgment is for the appellants on the other point.

BRUCE J. I am of the same opinion. It seems to me impossible to construe the words of 9 & 10 Vict. c. 66, s. 1, in

(1) (1852) 17 Q. B. 746. (2) 16 Q. B. D. 31.
(3) [1894] A. C. 230.

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any other way. The period during which Arthur Farr resided in the Brompton Hospital must therefore be excluded in computing the time necessary for him to acquire a settlement by residence in the appellant union.

Judgment for appellants. Leave to appeal given.

Solicitors for appellants: *Arkcoll, Cockell & Chadwick.*

Solicitors for respondents: *Speechly, Mumford & Co., for John Plummer, Canterbury.*

A. P. P. K.

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Jan. 29.

LONDON AND EASTERN COUNTIES LOAN AND DISCOUNT COMPANY *v.* CREASEY.

Bill of Sale — Specific Description — "Plant" — Substitution — Horse — Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 6, *sub-s.* 2.

Horses are not "plant" within the meaning of s. 6, sub-s. 2, of the Bills of Sale Act (1878) Amendment Act, 1882.

Yarmouth v. *France*, (1887) 19 Q. B. D. 647, distinguished.

APPEAL from the judgment of the county court judge of Westminster on an interpleader issue.

On June 22, 1896, one Roe, a cab proprietor, gave to the appellants, the London and Eastern Counties Loan and Discount Company, Limited, a bill of sale comprising certain horses and cabs which were therein specifically described.

Subsequently Roe parted with two of the horses included in the bill of sale, and purchased two others in substitution for them. He afterwards sent these horses to a repository, where they were bought by the respondent Creasey without knowledge of the bill of sale. The appellants having claimed the horses, the owner of the repository interpleaded. The respondent contended that the horses were not "plant" within the meaning of s. 6, sub-s. 2, of the Bills of Sale Act, 1882, and that therefore the bill of sale was void under s. 4 in respect of them.

The county court judge gave judgment for the respondent.

Lynden Bell, for the appellants. The horses, having been

substituted for other horses specifically described in the bill of sale, fall within the provision of s. 6, sub-s. 2, of the Bills of Sale Act, 1882 (1), and the bill of sale is not void in respect of them, although they are not specifically described. Horses have been held to be "plant" by the Court of Appeal in *Yarmouth* v. *France*. (2)

Clavell Salter, for the respondent. The decision of the Court of Appeal in *Yarmouth* v. *France* (2) has no bearing on this case. That was a decision on the Employers' Liability Act, in which the word "plant" is used in quite a different connection. In s. 6 of the Bills of Sale Act, 1882, "plant" is used as signifying something of a similar character to fixtures or trade machinery, and it must be something which can be attached to or used in the premises of the person giving the bill of sale. These horses cannot be "plant" within the meaning of the section.

Lynden Bell replied.

WRIGHT J. In my opinion the county court judge was quite right, and this appeal must be dismissed. It seems to me, without in any way criticising the case of *Yarmouth* v. *France* (2), that that decision is not in point in construing this section. When attention is paid to s. 5 of the Bills of Sale Act, 1878, and it is read with s. 6 of the Bills of Sale Act, 1882, it is plain that the word "plant" was intended to refer to things more or less similar in kind to trade fixtures or trade machinery. I think that the "plant" must have some relation to the land or place on which it is used. Sub-s. 1 of s. 6 speaks of growing

(1) By the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 6, "Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things (that is to say)—

"(1.) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed;

"(2.) Any fixtures separately assigned or charged and any plant or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land farm factory workshop shop house warehouse or other place in substitution for any of the like fixtures plant or trade machinery specifically described in the schedule to such bill of sale."

(2) 19 Q. B. D. 647.

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crops, and sub-s. 2 of fixtures, plant, or trade machinery "used in, attached to, or brought upon" the premises. The collocation seems to me to shew that the plant must be something of a similar character to fixtures or trade machinery. The words seem to shew that it was the intention of the Legislature that the plant should be substituted for other plant hitherto used on particular premises. It is true that there are the words "brought upon" any land, &c.; but I think the meaning of those words also is shewn by the words that precede them, "used in or attached to" any land, &c. The section is no doubt far from clear; but, on the whole, I think that the plant must be substituted locally for other plant, and that these horses were not plant within the meaning of the section.

BRUCE J. I am of the same opinion. The words of the Employers' Liability Act are quite different from those of the section now before us. There the words are "plant connected with or used in the business of the employer." Here it is spoken of as used in a particular place. The word, too, is here used in connection with the phrase "trade machinery," which is by the Act of 1878 limited to the machinery used in or attached to any factory or workshop. I think plant must have a similar meaning. In my opinion the substitution contemplated by the section must be a local substitution—a substitution for something used in a particular place. No doubt the words of the section are wide; but I think the words "or other place" must be read in connection with the words that precede it, and are limited by them to places of the same kind.

Appeal dismissed.

Solicitor for appellants: *Roland H. Ward.*
Solicitor for respondent: *Alfred Slater.*

A. P. P. K.

THE QUEEN v. HIS HONOUR JUDGE TURNER AND HODGSON.

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Feb. 1.

County Court—Practice—Action in District in which Cause of Action arose—Leave to commence Action—Discretion as to Grant or Refusal—Validity of Rule—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 74—*County Court Rules*, 1889, *Order v., r. 9a.*

On an application, under s. 74 of the County Courts Act, 1888, for leave to commence an action in the county court in the district of which the cause of action wholly or in part arose, the county court judge or registrar has a discretion as to the grant or refusal of leave, and is not bound to grant leave when it is shewn that the cause of action wholly or in part arose within that district.

Order v., r. 9*a*, of the County Court Rules, 1889, by which on such applications the judge or registrar shall exercise his discretion in each case as to the grant or refusal of leave in accordance with the circumstances, is not ultra vires, or repugnant to the statute, but is valid.

An order nisi had been granted (1) calling upon the judge of the county court of Durham, and the respondent Hodgson, to shew cause why leave should not be granted to the applicant to commence an action against Hodgson in the county court of Durham.

The question which arose was whether, where it was shewn that the cause of action arose, wholly or in part, in the district in the county court of which it was desired to commence the action, the judge was bound to grant leave to commence the action in that court, or whether he was entitled to exercise his discretion as to the grant or refusal of such leave.

H. Sutton shewed cause. By the express terms of s. 74 of the County Courts Act, 1888 (2), it is a condition precedent to

(1) Under s. 131 of the County Courts Act, 1888 (51 & 52 Vict. c. 43).

(2) 51 & 52 Vict. c. 43. By s. 74, "Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced, by leave of the judge or registrar, in the court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six calendar months next before the time

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the making of such an order as is asked for in the present case that the cause of action shall have arisen wholly or in part in the district in which it is desired to commence the action. The contention of the applicant must be that, when once it is shewn that this condition has been complied with, the judge has no discretion, but is bound to make the order, whether he thinks it just and convenient to make it or not; but the words of the section, "may be commenced," shew clearly that it was intended that the judge or registrar should have a discretion as to granting or refusing leave, and this is the view which has been taken by the Committee of County Court Judges who framed the Rules of 1889. Effect cannot be given to the applicant's contention without holding that Order v., r. 9*a* (1), of those rules is ultra vires and invalid. To hold this would be contrary to the judgment of Blackburn J. in *In re Brown* v. *London and North Western Ry. Co.* (2), decided on the corresponding provision in the former Act. (3) He said there: "it is at the discretion of the judge of the county court to give the parties permission to sue in the county court of the district where the cause of action arose." (4) The decision of the Court of Appeal in *Société Générale de Paris* v. *Dreyfus Brothers* (5), as to giving leave to serve a writ out of the jurisdiction, is in favour of the view that there is a discretion; and so is *In re Baker, Nichols* v. *Baker* (6), also in the Court of Appeal, where Cotton L.J. said: "I think that great

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of commencement, or with the like leave, in the court in the district of which the cause of action or claim wholly or in part arose."

(1) By the County Court Rules, 1889, Order v., r. 9*a*, "Where leave to enter a plaint under s. 74 of the Act is required, an application shall be made upon the affidavit of the plaintiff or of some person on his behalf who has knowledge of the facts . . . . The judge or registrar shall duly consider the facts disclosed by the affidavit, and exercise his discretion in each case as to the grant or refusal of leave in accordance with the circumstances; and where the plaintiff is the assignee of a debt, shall in particular consider whether the proposed place of trial is less convenient to the defendant than it would have been had the debt not been assigned, and if he shall be of opinion that it will shall refuse leave. . . ."

(2) (1863) 4 B. & S. 326; 32 L. J. (Q.B.) 318.

(3) 9 & 10 Vict. c. 95, s. 60.

(4) 4 B. & S. at p. 336.

(5) (1887) 37 Ch. D. 215.

(6) (1890) 44 Ch. D. 262.

misconception is caused by saying that in some cases 'may' means 'must.' It never can mean 'must' so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a judge has a power given him by the word 'may,' it becomes his duty to exercise it." (1) [He also referred to *Poyser* v. *Minors*. (2)]

Scott Fox, in support of the order nisi. The case of *In re Baker, Nichols* v. *Baker* (3), is not in point; it turned on s. 125, sub-s. 4, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), relating to the transfer of a petition for the administration of the estate of a deceased debtor, as to which very different considerations may be applicable. It is clear that words which are primâ facie directory may be construed as compulsory, if it is for the public benefit so to construe them: *Rex* v. *Steward and Suitors of the Manor of Havering Atte Bower* (4); *Rex* v. *Mayor and Jurats of Hastings*. (5) In *In re Brown* v. *London and North Western Ry. Co.* (6) the point now raised was not before the Court. *Société Générale de Paris* v. *Dreyfus Brothers* (7) is also distinguishable, for the decision in that case turned on the necessity of shewing a probable cause of action.

WRIGHT J. The language of s. 74 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), is as explicit as it could possibly be made. That section provides that an action may be commenced, by leave of the judge or registrar, in the court in the district of which the cause of action or claim wholly or in part arose. Then a rule was framed under the power given by s. 164 of the same Act (Order v., r. 9*a*, of the County Court Rules, 1889), which contains the following provisions: "Where leave to enter a plaint under s. 74 of the Act is required, an application shall be made upon the affidavit of the plaintiff or of some person on his behalf who has knowledge of the facts . . . . The judge or registrar shall duly consider the facts disclosed by the affidavit, and exercise his discretion in each case as to the

(1) 44 Ch. D. at p. 270.
(2) (1881) 7 Q. B. D. 329.
(3) 44 Ch. D. 262.
(4) (1822) 5 B. & Ald. 691.
(5) (1822) 5 B. & Ald. 692, n.
(6) 4 B. & S. 326; 32 L. J. (Q.B.) 318.
(7) 37 Ch. D. 215.

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grant or refusal of leave in accordance with the circumstances." Unless that rule is ultra vires and repugnant to the terms of s. 74, it is plain that the county court judge or registrar must exercise his discretion in determining whether he will or will not give leave that the plaint shall issue. Cases were cited in support of the order nisi to shew that a power which is permissive in form may, under certain circumstances, be in fact compulsory; but that depends in each case upon the terms of the statute by which the power is given. The order nisi must be discharged.

BRUCE J. I am of the same opinion. In *Julius* v. *Lord Bishop of Oxford* (1) Lord Penzance said, in the course of his judgment in the House of Lords: "The words 'it shall be lawful' are distinctly words of permission only—they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled—to the subject-matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred—they do, or do not, create a duty in the person on whom it is conferred, to exercise it." (2) In the same case Lord Selborne said: "The language (certainly found in authorities entitled to very high respect), which speaks of the words '*it shall be lawful*,' and the like, when used in public statutes, as ambiguous, and susceptible (according to certain rules of construction) of a discretionary or an obligatory sense, is in my opinion inaccurate. I agree . . . . that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and, in general, it is to be solved from the context, from the particular pro-

(1) (1880) 5 App. Cas. 214. (2) 5 App. Cas. at pp. 229, 230.

visions, or from the general scope and objects, of the enactment conferring the power." (1) To my mind these statements of the rule of law exclude the idea that, in such a case as the present, the exercise of the power given by the statute can be held to be compulsory. On the contrary, I think the Legislature did intend a discretion to be vested in the county court judge.

Order discharged.

Solicitors for applicant: *Eldridge & Parker, for C. J. Archer, Stockton-on-Tees.*

Solicitor for county court judge: *Solicitor to the Treasury.*

P. B. H.

MORRIS AND OTHERS, PETITIONERS; BEVES AND OTHERS, RESPONDENTS.

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Jan. 28; *Feb.* 17.

Elementary Education Acts—Election of School Board—Voting—Ballot-papers—Crosses, how to be counted—Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *s.* 2—*Elementary Education Act*, 1873 (36 & 37 *Vict. c.* 86), *Sched. II.—General Order of the Committee of the Privy Council on Education of August* 1, 1895.

At elections of school boards in boroughs a voter has the option of placing on the ballot-paper supplied to him, opposite the name of any candidate for whom he intends to vote, either crosses or figures to signify the number of votes he intends to give to such candidate. Where a ballot-paper is marked with crosses instead of figures the returning officer ought to count every cross as one vote for the candidate opposite whose name it is placed. If any ballot-paper be marked with a less number of crosses than the voter has votes at that election, the returning officer, in performing his duty of counting the votes, ought not to act upon any presumption or inference that the voter intended to exhaust his whole voting power. If, therefore, there are fifteen candidates for election, and a ballot-paper be marked with a single cross placed opposite the name of one only of those candidates, it ought to be counted as one vote, and not as fifteen votes, for that candidate. So, if a single cross be placed opposite the names of three or five of the fifteen candidates, it ought to be counted as one vote, and not as five or three votes, for the candidate opposite whose name it is placed.

SPECIAL CASE stated in the matter of an election petition touching an election, held October 1, 1896, of members of the

(1) 5 App. Cas. at p. 295.

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school board for the United School District of Brighton and Preston.

The case was stated by Mr. E. C. Cooke, an officer in the Election Petitions Office, pursuant to the order of Hawkins J., made under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 93, sub-s. 7.

The following statement of the facts stated in the special case (so far as they are material for the purposes of this report), and of the statutory and other provisions bearing on the questions before the Court, is taken from the judgment of Hawkins J. :—

At the triennial election of a school board for the united school district of Brighton and Preston there were fifteen members to be elected and eighteen candidates. The respondents, Beves, Stevens and Roth, against whom alone the petition was presented, were three of the successful candidates. As against their election it was alleged in the petition that the returning officer had erroneously counted the ballot-papers, and the votes recorded thereon, and that by reason of such error the result of the poll at the election was not accurately ascertained; and that three other of the candidates, namely, Bartlett, Dodson, and Houghton, ought to have been returned.

By an order made by me on November 16 last, it was directed that the questions involved in the petition should be raised by a special case to be settled by Mr. Edwin C. Cooke, and that there should be a recount by him of the votes recorded for the respondents, and for the said Bartlett, Dodson, and Houghton. Such recount has accordingly been made, and this special case stated for our consideration.

The facts found by Mr. Cooke are very clearly stated in it. As to seven ballot-papers, they did not bear the official mark, stamp, or perforation. The votes recorded in them were, therefore, disallowed in accordance with s. 2 of the Ballot Act, 1872 (35 & 36 Vict. c. 33).

In the 2nd schedule to the Elementary Education Act, 1873 (36 & 37 Vict. c. 86), it is enacted that "the election of a school board shall be held at such time, in such manner, and in accordance with such regulations as the Education Depart-

ment may from time to time by order prescribe, . . . provided that any poll shall, so far as circumstances admit, be conducted in like manner in which the poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted."

On August 1, 1895, the Lords of the Committee of the Privy Council on Education, by virtue and in pursuance of the powers in them vested under the Elementary Education Acts, 1870, 1893, published a General Order regulating the triennial election of a school board in the borough, in which, amongst other things, it was ordered that subject to the provisions of that order the poll should be conducted in like manner as a poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted:

"Provided that

"(*a*.) Every voter shall be entitled to a number of votes equal to the number of members of the school board to be elected, and may give all such votes to one candidate, or may distribute them among the candidates as he thinks fit.

"(*b*.) The voter may place against the name of any candidate for whom he votes, the *number* of votes he gives to such candidate in lieu of a cross; and the form of directions for the guidance of the voter in voting contained in the Ballot Act, 1872, shall be altered accordingly."

By s. 2 of the Ballot Act, 1872, it is enacted that "the ballot of each voter shall consist of a paper (called a ballot-paper) shewing the names and description of the candidates"; the ballot-paper, marked with the prescribed official mark, is to be delivered to the voter within the polling-station, and, the voter having secretly *marked* his vote on the paper and folded it up so as to conceal his vote, shall place it in a closed box, in the presence of the presiding officer, after having shewn to him the official mark at the back.

Schedule II. of the same Act provides for the placarding outside every polling-station, and in every compartment thereof, a form of directions for the guidance of the voter in voting. The form of directions adopted in the present election (so far as is material to the question before us) runs thus: "Every voter is entitled to fifteen votes, and may give all such votes to

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one candidate, or may distribute them among such of the candidates as he thinks fit."

"The voter will first obtain a ballot-paper from the presiding officer. The voter will then go into one of the compartments, and, with the pencil provided in the compartment, place on the right-hand side of the ballot-paper against the name of any candidate for whom he votes the *number of votes* he gives to such candidate."

Appended to these directions were examples of ballot-papers with votes marked. In each example opposite the name of each of the several candidates, in a column headed "Number of votes for each candidate," the number of votes intended to be given for such candidate is recorded in figures. In neither of the examples, however, is there any mention made of the option given to the voter to record his votes by crosses instead of figures, nor the mode in which he can by crosses indicate the number of votes he desires to give to any particular candidate.

[The judgment, read by Hawkins J., here proceeded: "It occurs to us that this form of directions may be usefully amended in any future election."]

Upon the recount of the votes, it was found that a great number of the ballot-papers were marked, and the votes distributed, by figures in the form above mentioned. No question has arisen with regard to these. Many others, however, were marked with crosses only—some with a single cross against one name only, others with a single cross against several names, and others with several crosses opposite the names of particular candidates. As regards these, very important questions have arisen as to how they should have been counted by the returning officer. The 7th paragraph of the case very conveniently classifies them as follows:—

(*a*.) Five ballot-papers marked with a single cross opposite the name of a single candidate.

These were counted by the returning officer as fifteen votes for each cross.

(*b*.) Two ballot-papers marked with a single cross opposite the name of each of three candidates.

These were each counted by the returning officer as five votes for each cross.

(*c.*) Ten ballot-papers marked with a single cross opposite the name of each of five candidates.

These were each counted by the returning officer as three votes for each cross.

(*d.*) Eighteen ballot-papers marked with a single cross opposite the names of two, four, six, seven, eight, nine, or ten candidates.

These were each counted by the returning officer as one vote for each cross.

(*e.*) Three ballot-papers marked with more than one cross, and for more than one candidate.

These were counted by the returning officer as one vote for each cross.

Mr. Cooke, as regards (*a*), (*b*), and (*c*), finds that the returning officer was right, and that the voters intended to vote as he counted the votes; but as regards (*d*) and (*e*) he finds that the returning officer ought to have rejected them altogether upon the ground of uncertainty, inasmuch as those crosses do not by any form of multiplication give a product of fifteen—that is, the full voting power of the voters.

The questions stated in the case for the consideration of the Court were:—

1. Whether the election of the respondents or any of them was void?

2. Whether Bartlett, Dodson, and Houghton were, or any of them was, duly elected and ought so to have been returned?

S. H. Day, for the petitioners. Both the questions asked in the case should be answered in favour of the petitioners. Mr. Cooke's conclusions as to the mode in which the crosses should be counted are correct. He has in substance followed the opinions expressed by Lord Coleridge C.J. in *Phillips* v. *Goff* (1)—that, where it is possible, a voter should be taken to have intended to exhaust his full voting power. What the voter intended is more a question of fact than of law; and here

(1) (1886) 17 Q. B. D. 805.

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the value intended to be given to the crosses in the various instances set forth in the case has been found as a fact by Mr. Cooke. The inferences he has drawn are proper inferences. Having regard to the directions given at this election, the voter would probably think that he was bound to give all his fifteen votes to someone. It is a fair inference that he would not have taken the trouble to vote at all if he was only going to give one vote to one candidate, or one vote to three or five candidates. The statements in the case shew that irregularities occurred at this election; the majorities of the successful candidates are small, and it is submitted that this Court ought to declare the election void. [He also referred to *Woodward* v. *Sarsons* (1) and the *Cirencester Case*. (2)]

Corrie Grant, for the respondents. The votes have been counted wrongly both by the returning officer and by Mr. Cooke. Each cross ought to be counted as one vote only. If the principles upon which they have acted be adopted, a cross will have a different value, varying according to the number of candidates at each election. Where, for instance, there were eleven candidates, all what may be termed "factor votes" would be disallowed, because eleven is a prime number. It cannot have been intended that the returning officer, whose mere duty is to count the votes, should make the kind of arithmetical calculation suggested in order to carry out what he conceives to have been the intention of the voter.

S. H. Day replied.

Cur. adv. vult.

Feb. 17. The following written judgment of the Court (Hawkins and Kennedy JJ.) was delivered by

HAWKINS J. This case was argued before my brother Kennedy and myself on January 28 last, when we took time to consider our judgment. [The learned judge stated the facts, &c., as set forth ante.]

The most important question discussed before us was as to the principle upon which the crosses upon the ballot-papers in

(1) (1875) L. R. 10 C. P. 733.
(2) Day's Election Cases, 1892 and 1893, p. 157.

classes (*a*), (*b*), (*c*), (*d*), and (*e*) ought to be counted. It is right to mention that in dealing with these ballot-papers, and in finding as he has done in regard to the intention of the voters, Mr. Cooke has not acted upon his own independent judgment, but in deference to the views of Lord Coleridge C.J., expressed in *Phillips* v. *Goff* (1), as to the principle on which the votes recorded upon them should be counted, namely, "that a voter must be taken to vote up to the full extent of his voting power." That was a school-board election case similar to the present, with this difference only—that the number of members to be elected was eleven instead of fifteen. In some of the ballot-papers a single cross appeared opposite the name of one candidate only. This cross the returning officer had counted as eleven votes for that candidate. The case came before the Court on a case stated by a commissioner appointed to try a petition against the election. In reference to these ballot-papers Lord Coleridge expressed himself thus: "It may be said that the voter, knowing that he might cumulate his votes and desiring to do so, meant to plump for that candidate; or it may be said that this interpretation of his intention would be breaking into the principle that a single cross indicates a single vote, and therefore that the voter ought to be taken to have meant to give one vote only to the candidate, leaving his other ten votes undisposed of; or it may be said that the putting the single cross opposite the name of one candidate being as consistent with one of these views as with the other, the commissioner ought to reject the voting-paper as void for uncertainty. My own opinion is that the first view is the correct one. It seems to me exceedingly unlikely that a man who takes the trouble to vote at all, should not vote up to the full extent of his voting power. I do not think that is the right inference to draw, and I should therefore myself arrive at the conclusion that the voter intended to give all his eleven votes to the one candidate opposite whose name he had put the cross. . . . I think the question whether the single cross means one thing or another is a question not of law but of fact, which the *commissioner* is the proper authority to determine. *We must leave it to him to say*

(1) 17 Q. B. D. 805, at p. 815.

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whether in his opinion the single cross meant one vote or eleven votes, and *if he has a real doubt upon the matter he must act upon it, and reject the voting-paper as void for uncertainty.*" Denman J. thought that "the single cross put opposite the name of a single candidate indicated an intention to give one vote only," but he agreed with the Lord Chief Justice that the question was not wholly one of law, and he expressed an opinion that it could be better dealt with at the place by the commissioner with his experience and knowledge of the habits and ways of the class of persons who vote at such elections.

We do not doubt that the *actual* intention of the person who performs any act, whether it be of voting or anything else, is a question of fact; and if the duty of ascertaining it is by law cast upon any tribunal or official person, such tribunal or officer must endeavour to discharge that duty upon such evidence as is available; and naturally the best evidence, assuming it to be credible, would be that of the individual whose intention is in question. In order to determine the result of an election by ballot, the returning officer has no duty cast upon him to inquire into or determine the real intentions of the voters whose ballot-papers he is required to count. He has no machinery at his command for doing so, and he certainly could not question the voter. The ballot-paper alone is all he has to do with. If on the face of it it is marked in the manner required by the Ballot Act, and no ambiguity is apparent upon it, we consider it to be his duty to count the votes as they appear upon it, and it is beyond his duty or power to alter the effect of a mark or a figure upon it, even though from circumstances outside the voting-paper he were sure in his own mind that the voter intended to vote differently. The voter is secretly *himself* to mark the vote or votes he intends to give, and deposit his paper in the sealed ballot-box. The returning officer's duty is to count what he finds in that box after the poll is closed, and in doing so not to speculate on what the voter *intended*. "Counting" is the only thing he has to do so far as relates to the ascertainment of the number of votes recorded for the several candidates; and we are of opinion that he cannot look beyond the face of the ballot-paper. It

must not be forgotten that in these school-board elections the voter, having the option to use either crosses or figures, has every facility afforded him by the use of figures unmistakably to indicate on his ballot-paper the number of votes he desires to give for any particular candidate; and if he chooses to use crosses instead of figures, it being common knowledge that ordinarily each cross means only one vote, he should take care to mark as many crosses as he intends to give votes to his favoured candidates—the form of directions expressly points to his marking the *number* of votes he gives. It seems to us that to allow the returning officer, whose plain duty is simply to count the votes as they appear recorded before his eyes on the face of the ballot-paper, acting upon a questionable presumption (admittedly not one of law) that the voter must be taken to have meant to exhaust his voting powers, to multiply a single cross by the number of members to be elected, or to multiply two or three single crosses against the names of as many candidates by a proportionate number of such votes, would be to introduce an element of uncertainty in the value of the marks upon the ballot-paper never contemplated by the Ballot Act itself. As well might it be said that, if a voter placed opposite the name of a single candidate thirteen crosses only, the returning officer ought to count two more to make up the full voting power of the voter. This multiplication, however, is what the returning officer did in classes (*a*), (*b*), and (*c*) above mentioned. In this particular case, the number of persons to be elected being fifteen, there would be no difficulty in applying the presumption to ballot-papers where single crosses were marked against single names, nor where single crosses were marked against three or five names only, for fifteen is divisible by three and five. But with regard to ballot-papers where single crosses were marked against two or four or six or seven names, inasmuch as fifteen is not divisible by either of those numbers, each cross could only be counted as a single vote. The same result would of necessity attend single crosses against every number of candidates between seven and fifteen. A moment's consideration will suffice to shew that a single cross against 2, 4, 6, 7, 8, 9, 10,

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11, 12, 13, 14 names only, would make it absolutely impossible to exhaust the voting power among them, and wasted votes would be the inevitable result. To test this, let us assume in this case a single cross against the names of four candidates. Fifteen cannot for voting purposes be divided by four, so as to exhaust the voting power of the voter. It is true twelve of the fifteen votes might be exhausted if three votes were counted for each cross; but then there would be three wasted. As, however, according to our view, each ought to be accorded as a single vote, eleven would be wasted. It is obvious that if the returning officer were, in such cases as above described, called upon to consider and determine the intent of the voter, and according to such intent to give to single crosses a value not ordinarily attributed to them, that duty would entail upon him the necessity of inquiries and calculations not involved in the mere duty of counting. For the guidance of the returning officer in counting votes, we feel it right to note that, subject to what we have said, we do not think that a ballot-paper ought to be altogether rejected because it may be doubtful on the face of the paper whether the voter intended by it to give one vote or fifteen votes. In such cases, where the intention to give at least one vote is clear, such vote ought to be counted, and it would be wrong to reject it for uncertainty simply because it was doubtful whether the remaining fourteen votes ought not to be added to it. In our opinion it is far more in accordance with the spirit and object of the Ballot Act, and far more reasonable and practical, to take the crosses made by the voter himself, whether one or more, according to the ordinary interpretation—one vote for each cross—than that the value of a cross should be variable according to presumptions or inferences as to the voter's intentions, the accuracy of which must be always open to question, for the voter himself cannot be examined as to them, and may have had his own reasons for doing that which to others may seem strange, unwise, or unintelligible.

We think, therefore, that if there be nothing on the face of the ballot-paper to indicate to the contrary, whether the voter gives his votes by crosses or by figures, that which he has

marked upon his ballot-paper shall be taken as absolute proof of his intention to do that which he has done, and no more. Uniformity will at least be attained by this. By adopting one uniform rule facility will be given to the returning officer in discharging his duty of counting. This is a great deal when the votes of some four- or five-and-twenty thousand electors have to be dealt with, as in this case. This disposes of all the ballot-papers comprised in classes (*a*), (*b*), (*c*), (*d*), and (*e*).

As to the ten ballot-papers comprised in class (*f*) and referred to in paragraph 10 of the case, we are of opinion that as to the one which bore no mark of cancellation, but was marked with an excess of votes, the propriety of its rejection is not open to doubt. As to the remaining nine which on the face of them were valid, and were found by Mr. Cooke to be so as a fact, we think they ought to be rejected—not because we are satisfied they were spoilt ballot-papers, but because, being ballot-papers which, to give the votes recorded in them any effect, ought to have been placed by the voter in the ballot-box, there was nothing to shew or to raise a presumption that they were ever inside the ballot-box at all. Irregularities no doubt occurred at the election; but they do not explain by any facts, but merely support the possibility, that they may have been placed in the box, and have either accidentally escaped, or been wilfully taken from it. We have no proof, however, that such was the case—it is a mere speculation; we therefore think that they ought to be rejected.

We do not, at this moment, feel justified in declaring the election void; nor could we declare it void altogether, for the petition only affects the three respondents; but there must be a recount of the votes on the principle we have enunciated, and our final judgment on the petition must be deferred until the result of such recount is made known to us.

We think there ought to be no costs on either side.

Order for a recount accordingly.

Solicitors for petitioners: *Clarke & Calkin, for George Cheesman, Brighton.*

Solicitors for respondents: *Prince & Co.*

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[IN THE COURT OF APPEAL.]

MINNA CRAIG STEAMSHIP COMPANY AND JAMES LAING *v.* CHARTERED MERCANTILE BANK OF INDIA, LONDON AND CHINA.

Company—Liquidation—Judgment in rem—Ship—Lien—Proceedings in Foreign Court—Right to retain Proceeds against Liquidator.

Whilst a ship, owned by the plaintiffs, an English company, was loading at Bombay for a voyage to Hamburg, her master was induced by fraud to sign bills of lading for goods which were never put on board. The bills of lading were indorsed for value without notice of the fraud to the defendants, an English banking company. By the law of Germany non-delivery of the goods specified in a bill of lading entitles the holder of the bill to a lien upon the vessel. The ship sailed, and whilst she was at sea a petition was presented for the winding-up of the plaintiff company, and on the day on which the ship arrived at Hamburg a winding-up order was made. On the same day the defendants, who had in the meantime discovered the fraud, took proceedings in the German Court at Hamburg to arrest the ship and to enforce their lien. The German Court ordered the ship to be sold, declared the defendants to be entitled to the lien claimed, and ordered that lien to be satisfied out of the proceeds of the sale. The liquidator of the plaintiff company, who had not appeared in the proceedings in the German Court, brought an action in England in the name of the company against the defendants to recover from them the amount which they had received under the German judgment as money had and received to the plaintiffs' use, seeking to make them liable as trustees of the money for the benefit of the general body of the company's creditors.

Held (affirming the judgment of Collins J.) that, the judgment of the German Court being a judgment in rem, the money received by the defendants under it was not subject to any trust in favour of the general body of the company's creditors, and that the action was not maintainable.

APPEAL from the judgment of Collins J. in favour of the defendants.

The facts are fully stated in the report of the case in the Court below. (1)

Feb. 19. *Joseph Walton, Q.C.*, and *H. F. Boyd, Q.C.*, for

(1) Ante, p. 55.

the plaintiffs. The judgment of the German Court was not a judgment in rem as regards the title to the money in question as between the plaintiffs and the defendants. So far as the arrest and sale of the ship were concerned, no doubt the proceeding in the German Court was in rem. It determined the status of the res, i.e., the ship, and a good title was given by it to the purchaser of the ship as against all the world; but, as regards the subsequent distribution of the proceeds of the sale, the decree of the German Court was not a judgment in rem, and was only binding on parties or privies. Clearly there was no maritime lien according to general maritime law in this case. The procedure in rem by way of arrest and sale of the ship, whether in the Court of Admiralty or in a foreign Court, is only a mode of compelling appearance and of securing the fruits of a judgment; and, though the proceedings must be considered to be in rem as determining the status of the ship, they are in personam only so far as concerns the right to the money recovered; and it is a mistake to suppose that that part of the judgment of the Court which relates to the application of the proceeds of sale of the ship is to be considered as a judgment in rem.

[They cited on this point *Castrique* v. *Imrie* (1), and *The Heinrich Björn*. (2)]

Assuming, however, that the judgment of the German Court was in all respects a judgment in rem, the defendants are not entitled to retain the moneys which they received under it for their own use, but are trustees of them for the general body of the creditors of the plaintiff company. From the date of the winding-up petition, namely, July 20, the property of the company was affected with a trust for the benefit of its creditors, and any person into whose hands any of that property came with notice in whatever way is affected by that trust, including a person who might obtain a judgment in rem. The judge in the Court below held that the effect of the judgment of the German Court was to declare that the defendants had a lien on the ship antecedently to the date of the winding-up

(1) (1870) L. R. 4 H. L. 414. (2) (1885) 10 P. D. 44.

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petition (1), and that therefore the trust which arose for the creditors as to the property of the company could not affect that lien. It is contended that that could not be the effect of the German judgment. The Court could not have meant to decide that the lien arose immediately on the signing of the bills of lading at Bombay. The effect of the German Code plainly is only to give a lien for non-delivery of the goods, and such a lien can only arise when, after the ship has arrived at the port of discharge, there is a failure to deliver the goods. There could not be a lien for non-delivery before the time for delivery arrived. The ship did not arrive at Hamburg till after the winding-up order was made, and therefore the lien did not come into existence till after the title of the liquidator accrued. No creditor can obtain priority by proceedings taken after the date of the liquidation.

[They cited on this point *Hunter* v. *Potts* (2); *Sill* v. *Worswick* (3); *In re Oriental Inland Steam Co., Ex parte Scinde Ry. Co.* (4); Companies Act, 1862, ss. 84, 85, 87, 95, 153, 163.]

Sir R. T. Reid, Q.C., and *English Harrison*, for the defendants. The suit in the German Court was clearly an action in rem. By art. 758 of the German Commercial Code ship's creditors have a legal lien on the vessel, and by art. 757 the rights of a ship's creditor are acquired by virtue of (inter alia) claims for non-delivery of or damage to goods forming part of cargo. The question in the suit at Hamburg was whether the defendants were ship's creditors, and as such had a lien on the ship; and the Court decided that they had such a lien, and handed over to them in respect of it the amount of 10,944*l.* out of the proceeds of sale of the ship. Being a judgment in rem, the determination of the German Court is conclusive as to the defendants' title to that lien on the ship as against all the world. It is contended that the effect of the German judgment was to declare the existence of a lien arising antecedently to the non-delivery of the goods from the signature by the captain of the

(1) It will be observed from the judgments that there appears to have been some difference of opinion in the Court as to the effect of the German judgment in this respect.

(2) (1791) 4 T. R. 182.

(3) (1791) 1 H. Bl. 665.

(4) (1874) L. R. 9 Ch. 557.

false bills of lading at Bombay. The lien was therefore declared to have existed before the commencement of the liquidation, and cannot be defeated by the subsequent winding-up of the company. The sections of the Companies Act, 1862, upon which reliance has been placed for the plaintiffs, were intended to prevent the issue of fresh executions and attachments and the acquisition of fresh rights against the property of the company after the commencement of the liquidation, but not to interfere with previously existing liens or other rights. In the case of *In re Oriental Inland Steam Co., Ex parte Scinde Ry. Co.* (1), the proceedings were in personam.

Boyd, Q.C., in reply.

Cur. adv. vult.

Feb. 23. LORD ESHER M.R. In this case the liquidator of the plaintiff company, which is being wound up, has in the name of the company brought an action against the defendants for money had and received—that is to say, an action in which it is asserted that the defendants have in their hands money which, in law or in equity, they ought to pay over to the plaintiffs. The facts are as follows. The company were the owners of a ship. The ship being at Bombay loading cargo for a voyage to Hamburg, the captain by fraudulent representations was induced to do that which according to English law he had no authority as against the owners to do—namely, to sign bills of lading for goods which were not on board the ship. If proceedings had been taken in this country, the shipowners would not have been bound by the signature of such bills of lading by the captain. The defendants became holders for value of the bills of lading. Upon the arrival of the ship at Hamburg a suit was commenced by the defendants in the German Court there, and the first question which arises was whether this suit was an action in rem or not. It is contended for the plaintiffs that it was not. There is no doubt that it was commenced in the manner appropriate to a proceeding in rem—namely, by arrest of the ship. After the arrest the proceedings were continued, and, upon its being shewn that the

(1) L. R. 9 Ch. 557.

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captain had signed the bills of lading of which the defendants were the holders, it was held by the German Court that, that being so, the owners of the ship could not deny that the goods had been shipped on board, and there was therefore no answer to the claim of the defendants in respect of the non-delivery of the goods. Thereupon the Court, proceeding in the manner appropriate to an action in rem, condemned the ship; and, the ship having been sold, the proceeds of the sale were paid into court; and the Court subsequently ordered the sum of 10,944*l.* to be paid to the defendants out of the money in court in satisfaction of their claim. Every step in the proceedings so taken in the German Court appears to me to have been in accordance with the procedure in an action in rem, and not in accordance with the procedure in an action in personam. I therefore think it obvious that the German Court, in what they did, assumed to be acting in rem. It was urged that such a non-delivery of cargo as was complained of in this case does not confer a maritime lien according to the international rules of law with regard to maritime lien; but the Court at Hamburg held that, by virtue of a statute governing the matter in their country, they had power to proceed in rem against the ship; and they accordingly did so, and their decision was upheld by two Courts of Appeal in Germany. That being so, the rule is that, as a matter of international comity, no Court in this country can say that the German Court had no jurisdiction to decide as they did. It was suggested that the German statute did not authorize the Court to do what they did; but it was clearly for that Court to construe the statute of their own country and decide accordingly; and we are therefore bound to hold that the ship was rightly condemned in an action in rem as if there had been a maritime lien. What then is the result of such a proceeding? When the decision is given it relates back to the time when the cause of condemnation came into existence. It was suggested for the defendants that in this case it was in existence when the ship left Bombay. I do not myself accept that view. I think that it arose when, the ship having arrived at the port of destination, she ought to have made delivery of the goods. But, when the ship is condemned

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by a Court having jurisdiction to condemn her in rem, by that condemnation the property in the ship is taken out of the former owners, and she becomes the ship of the claimants in the proceedings in rem to the extent of their claim. They of course have not the possession of the ship, and cannot sell the ship or transfer her when sold. She is in the hands of the Court, which orders her sale and gives title to the purchaser, and, when the sale has taken place, the purchase-money is paid into court. The Court, treating the money so paid in as representing the ship, orders it, or so much of it as may be necessary to satisfy their claim, to be paid out to the claimants. So in the present case the money which was the proceeds of the sale of the ship was paid into court for the Court to deal with, and the Court ordered it to be paid to the defendants. It was said on behalf of the plaintiffs that, before the cause of condemnation of the ship arose—that is to say, before the arrival of the ship at Hamburg—an order was made for the winding-up of the plaintiff company; and that the ship was therefore an asset of the company, and the liquidator was entitled to her as a trustee for the benefit of the creditors of the company; and that the defendants, who were only one set of creditors among others, were trustees of the money which they as such creditors had obtained by the judgment of the German Court for the whole body of creditors. If the judgment of the German Court had not been a judgment in rem, this might perhaps have been so, but I think that, the ship having been seized and condemned in a proceeding in rem at the suit of the defendants, even although the cause of condemnation did not arise till after the liquidation commenced, nevertheless by reason of her condemnation the ship ceased to be an asset of the company. The present defendants did not in my opinion obtain the money which was paid to them out of the proceeds of the ship by order of the German Court as creditors of the company. They obtained it for themselves in their own personal right as persons to whom it was given by the decree of the German Court acting in rem in a proceeding against the ship. By the judgment of that Court the ship was declared to have been to the extent of their claim their property. They received the money which was

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paid to them by order of the German Court, not as creditors of the company, but as being persons declared by the decree of the Court to have a lien on the ship, and to be therefore interested in the proceeds of her sale to the extent of that lien. I am of opinion that under these circumstances the defendants cannot either in law or in equity be considered to hold this money as trustees for the liquidator of the plaintiff company. For these reasons I think the appeal must be dismissed.

LOPES L.J. read the following judgment:—The ship *Minna Craig* was at Bombay, and, by a fraud perpetrated by persons who have been imprisoned, the captain was induced to sign bills of lading for cargo that never was in fact put on board. The defendants were indorsees of the bills of lading for value in respect of certain goods. The ship sailed from Bombay to Hamburg. The defendants indorsed the bills of lading to their agents in Hamburg. These agents took proceedings to arrest the ship. Judgment was given which was carried successively to two Courts of Appeal in Germany, and by that judgment the ship was ordered to be sold. The rights of different parties against the ship were ascertained, and the agents of the defendants were declared to have a right to the proceeds in priority to every one except the crew, who sued for wages, and some persons who had supplied necessaries for the voyage. They were held to have priority over Mr. Laing, an English mortgagee, who was added as one of the plaintiffs, and who had become mortgagee long before the ship went to Bombay.

This action is brought by the liquidator of the English company owning this one ship, the *Minna Craig*, to recover back from the defendant company the sum of 10,944*l.* which has been paid to them out of the proceeds of the sale. On the very day on which the proceedings against the ship were commenced in Germany, namely, August 11, a winding-up order was made in England, and the petition upon which the winding-up order was made was filed as far back as July 20, and all the necessary advertisements were duly published in the newspapers. It would follow, therefore, that the defendants had notice of proceedings which in England, in the circumstances

stated, would have debarred them from asserting any claim against the *Minna Craig*. The goods in respect of which the bills of lading were given never having been on board, the defendants according to English law never acquired any right to those goods, or any claim upon them against the owners of the ship. According to English law, therefore, the defendants would have been prevented from making any valid claim against the ship or her owners. In these circumstances, can the defendants retain this sum of 10,944*l.*?

The defendants say that the proceedings in Germany were proceedings in rem, and that the distribution and determination of priorities which followed upon it were all parts of a judgment in rem, and consequently are binding upon all persons whether they were parties to the suit or not.

The plaintiffs contended but faintly that the judgment was not a judgment in rem; but, even if it was, they said that the ship itself, being the property of a company in liquidation, was affected with a trust, and that anybody, whether claiming under a judgment in rem or not, who had notice of that trust, if he acquired any lien by that judgment, must take it subject to the equity of recouping everything he got under it to the proper person, namely, the liquidator of the company. It may be observed that the liquidator, or rather the company by their liquidator, did not appear in the German proceedings at all. The mortgagee, Mr. James Laing, did appear, and was a party to taking the case through all the stages to the final Court of Appeal in Leipzig; but the plaintiff company did not appear, although the Court in Germany, so far as it could, secured their appearance, and appointed counsel to appear and argue for them. The learned judge in the Court below has found that the judgment in Germany was a judgment in rem, and that it was binding upon all the world. I agree with him. Repeatedly in the judgments the right of the plaintiffs in the German suit is referred to as a lien. The judgment has declared that there was a lien or charge created by the act of the master in signing for the goods as he did. They have asserted that that lien existed, and they have given effect to it by the judgment in rem. We can therefore only deal with it as a

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judgment in rem, as a conclusive judgment binding upon all the world, declaring that the persons through whom or in whose behalf the plaintiffs in the German suit claimed had such a lien. It is a declaration as to the status of the ship, binding upon everybody, and no English Court can impeach it. It is a judgment declaring an absolute and antecedent lien in the persons in whose favour the German Court has decided, and we cannot say that the defendants on account of anything that has happened are bound to give up to the liquidator of the company or to anybody else that which has been given to them as the fruits of that lien. I think the appeal must be dismissed.

CHITTY L.J. The first question relates to the ship and the distribution of the proceeds of her sale. At the time of her arrest she was in the territorial waters of the Empire of Germany. The Court or Courts which ordered her arrest and sold her were duly constituted courts of competent jurisdiction to deal with the ship and to determine her status. The proceedings were against the ship herself. It was admitted by Mr. Boyd, who argued this point of the case, that the proceedings, so far as the sale of the ship, were in rem, and that the purchaser of the ship acquired a good title to her as against all the world; but he attempted to draw a line at this point, and contended that the proceedings subsequent to the sale, including the distribution of the sale moneys, were not in rem, but in personam merely. I am of opinion that a line cannot be thus drawn. There appears to be no authority for this contention, though circumstances which would give rise to it must have occurred over and over again. The distribution of the sale moneys is an essential part of the proceedings against the ship. The ground and object of the sale was to turn the ship into money, and the money, as well as the ship herself, was subject to the jurisdiction of the Court. You cannot reasonably or conveniently divide or apportion the ship among the persons having maritime liens. The sale money becomes necessarily the substituted "res." The German Courts applied German law to the case. Under English law the

defendants, as holders of the bills of lading, could not have succeeded against the owners of the ship, much less against the ship herself. Their claim against the owners would have at once been defeated by shewing, as the fact was, that the goods had never been put on board. But by the German law the shipowners were bound conclusively by the bills of lading, and were not at liberty to deny that the goods were put on board. By the English law the holders of a bill of lading have no lien on the ship; but by the German law, as declared in these proceedings, the holders of the bills of lading had a lien in the nature of a maritime lien on the ship. In the scheme of division the German Courts placed the defendants as such holders in the category of "ship's creditors," carrying with it the right to be paid by the ship or out of the proceeds of her sale, and gave them priority even over Laing, the mortgagee of the ship. The Courts accordingly allotted 10,944*l.*, part of the sale moneys, to the defendants in their own individual right as creditors of the ship.

The second question relates to the effect of the English statute and the winding-up of the plaintiff company, who were entitled to the ship, subject to the maritime liens and liens of that nature upon her and to Laing's mortgage. The winding-up began on July 20, 1892. The order to wind up was made on August 11, and the ship arrived at Hamburg on the evening of that day after the winding-up order was made. The appellants relied on s. 163 of the Companies Act, 1862, and the decision of the Court in *In re Oriental Inland Steam Co., Ex parte Scinde Ry. Co.* (1) It was contended by Mr. Walton, who argued this part of the case, that this authority applied, and that, the assets of the company being bound by a trust for distribution among the creditors, the defendants were bound to hand over the 10,944*l.*, as part of the assets, to the liquidator for distribution among the creditors of the company. It was urged that no right of action or lien accrued to the defendants until after the ship had arrived at Hamburg and was ready to discharge. But this is an attempt to qualify the judgment of the German Court by the introduction of English law, and

(1) L. R. 9 Ch. 557.

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MINNA CRAIG STEAMSHIP COMPANY v. CHARTERED MERCANTILE BANK OF INDIA, LONDON AND CHINA.

Chitty L.J.

on that ground to question its binding effect. It was said that the lien or right to be paid out of the proceeds of sale of the ship, as found by the German Courts, did not arise till after the commencement of the winding-up. But the German Courts applying their law did not create the lien or right as on August 11, but they ascertained and declared that it was then subsisting and bound the ship. The distinction between this case and *In re Oriental Inland Steam Co., Ex parte Scinde Ry. Co.* (1), is that in that case the proceedings were in personam, and not as here in rem. Collins J. put this part of the case neatly and tersely when he said that the judgment of the German Court in favour of the defendants was an authoritative and final declaration of right under a judgment in rem.

There is also another view according to which the defendants would be equally entitled to succeed, namely, if they were secured creditors. The effect of the judgment of the German Court having jurisdiction over the ship was, to put it at the lowest, to hold them to be secured creditors, and to adjudge the 10,944*l.* to them in that character. Consequently the 10,944*l.* was not part of the assets of the company in the winding-up.

Laing is a co-plaintiff; but it is unnecessary to say anything about his claim. The plaintiffs' counsel did not attempt to sustain the action on the ground of any right in him.

Appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *Clarke, Rawlins & Co.*

(1) L. R. 9 Ch. 557.

E. L.

[IN THE COURT OF APPEAL.]

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WILLIAMS *v.* GOOSE.

Practice—Payment into Court—Rules of Procedure—Ultra Vires—Issue tried by Jury—Order XXII., *r.* 22—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), s. 22.

Order XXII., r. 22, provides that, where a cause or matter is tried by a judge with a jury, no communication to the jury shall be made, until after the verdict is given, either of the fact that money has been paid into court, or of the amount paid in; and that the jury shall be required to find the amount of the debt or damages, as the case may be, without reference to any payment into court:—

Held, that the rule is not ultra vires.

APPLICATION for a new trial in an action tried by Mathew J. with a jury on the ground of misdirection.

The action was for personal injuries alleged to have been occasioned to the plaintiff by the defendant's negligence. The defendant in his defence denied liability, and paid 30*l.* into court as being sufficient to satisfy the plaintiff's claim, on which defence the plaintiff joined issue.

At the trial the jury, who were not informed of the payment into court, found a verdict for the plaintiff for 15*l.* damages, and judgment was thereupon entered for the defendant.

Crump, Q.C., and *Hohler*, for the plaintiff. One of the issues raised on the pleadings being whether the sum paid into court was sufficient, the judge was bound to leave that issue to the jury in terms, which he did not do. Order XXII., r. 22, which provides that the fact of payment into court is not to be communicated to the jury, is ultra vires. The power of making rules under the Judicature Acts is confined to matters of procedure, and cannot be exercised so as to affect the substantive rights of litigants, one of which is to have the issues of fact raised in an action left to the jury. The rule is in contravention of s. 22 of the Judicature Act, 1875, which enacts that nothing in the Act or any rule made under it shall take

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away the right of a party to an action to have the issues for trial by jury submitted and left by the judge to the jury with a proper direction in point of law.

[They cited *Wheeler* v. *United Telephone Co.* (1)]

Dickens, *Q.C.*, and *Mallinson*, for the defendant. Order XXII., r. 22, is not ultra vires. It clearly deals with a matter of procedure, namely, the mode of conducting the trial by a jury. It does not contravene s. 22 of the Judicature Act, 1875. The issue for the jury really is the amount of the damages. It is within the power of making rules given by the Judicature Act to regulate the mode in which that issue shall be left to the jury, which is all that the rule does.

Crump, *Q.C.*, in reply.

LORD ESHER M.R. This is an action against the defendant for negligence through which the plaintiff sustained injury. The jury assessed the damages at 15*l.*, and, the defendant having paid 30*l.* into court, the result was that the verdict and judgment were for the defendant. The plaintiff moves for a new trial on the ground of misdirection, because the judge never told the jury of the payment into court. It was argued that, where money is paid into court, the issue is whether it is sufficient to satisfy the plaintiff's claim, and that issue ought in terms to be left to the jury. Order XXII., r. 22, expressly provides that neither the fact that money has been paid into court nor the amount paid in shall be communicated to the jury. It was argued that that rule was made ultra vires. I do not think that is so. The Rule Committee have under the Judicature Act power to make rules as to practice and procedure which have to be laid before Parliament. I have no doubt that the mode in which a trial by jury is to be conducted is a matter of procedure. The rule in effect provides that, the issue being whether the amount paid into court is sufficient, that issue is to be left to the jury in this way, namely, the jury is to be asked what the proper amount of the damages is; and, when that amount is ascertained by their verdict, it is a mere question of arithmetic what the effect of the finding of the jury is with

(1) (1884) 13 Q. B. D. 597.

regard to the issue. The issue is really left to the jury and tried by them. The rule only provides that this shall be done in a particular way. I think it is impossible to say that this rule is ultra vires, assuming that we have power, if it were, to say so. For these reasons the application must be refused.

LOPES L.J. I agree. It is argued that there was misdirection, because the learned judge at the trial, acting on Order XXII., r. 22, did not tell the jury that 30*l.* had been paid into court. The plaintiff's counsel contended that the judge ought to have disobeyed the rule as being ultra vires. It is unnecessary I think to express any opinion whether, if it were ultra vires, we should have power to treat it as being so, for it appears to me not to be ultra vires. It deals in my opinion merely with procedure. It was argued that by reason of the provisions of s. 22 of the Judicature Act, 1875, the judge is bound to leave the issues in the case to the jury. I do not think that it can be said that any issue in this case was improperly withdrawn from the jury. The issues were really whether the defendant was liable, and if so, to what damages the plaintiff was entitled. In my opinion the question whether the amount paid into court is sufficient is not an issue within the meaning of the section. It does not affect the amount of the damages, and is only material with regard to the costs. When the jury have ascertained the amount of the damages, the result with regard to the question whether the payment into court is sufficient is a mere matter of arithmetic. I therefore come to the conclusion that the rule, which in my opinion is most salutary and has worked well, relates merely to procedure, and consequently is not ultra vires.

CHITTY L.J. I am of the same opinion. It seems to me clear that Order XXII., r. 22, relates merely to procedure, and that it has not the effect, as suggested, of enabling the judge to withdraw the true issue from the jury. Under that rule the jury find the amount of the damages, which is the true issue, without being informed of the payment into court; and, the

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amount so found being compared with the amount paid into court, the result is a mere matter of arithmetical computation.

Application dismissed.

Solicitors for plaintiff: *Sismey & Sismey, for Tolhurst, Lovell & Clinch, Gravesend.*

Solicitor for defendant: *L. Kirkman, for Mitchell & Macartney, Gravesend.*

E. L.

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MANDERS *v.* MANDERS.

Husband and Wife—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 11—*Appeal from Justices—Mode of Appeal.*

There is no power in a court of summary jurisdiction to state a case for the opinion of the Queen's Bench Division upon a point of law arising on an application for an order under the Summary Jurisdiction (Married Women) Act, 1895; the only mode in which their decision can be questioned is by an appeal to the Probate, Divorce and Admiralty Division under s. 11 of that Act.

CASE stated by justices for Louth.

An application had been made to justices by the respondent, who was the wife of the appellant, for an order under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground that he had been guilty of wilful neglect to provide reasonable maintenance for his wife, and by such neglect had caused her to live separately and apart from him. The facts were shortly as follows.

The appellant and respondent had been living apart since 1891 under the terms of a separation deed which provided for the payment of four shillings a week by the appellant to the respondent; these payments had been irregularly made, and no maintenance had been paid since September 18, 1896. The appellant alleged molestation as a reason for non-payment; but no molestation since that date was proved. On October 28, 1896, the respondent returned to the appellant's house; the latter said, "What have you come here for?"; the respondent

said, "I've come to stay; I've come for some money"; to which the appellant replied, "You'll get none here," and then forcibly turned her out of the house as she refused to go; since that time the wife had again lived separately and apart.

The justices found as a fact that the appellant had been guilty of wilful neglect to provide reasonable maintenance for the respondent, and by such neglect did on October 28, 1896, cause her to leave and live separately and apart from him.

The summons in the case followed the words in the Act, omitting the words "leave and."

It was contended for the appellant that as a matter of law the appellant had not been guilty of wilful neglect to provide reasonable maintenance for the respondent within the meaning of the Act; that even if he had been guilty of such neglect there was no evidence upon which the justices could find that the appellant had by such neglect caused the respondent to leave and live separately and apart from him; and that the summons, which omitted the words "leave and," was irregular.

The justices were of opinion that the summons sufficiently disclosed the nature of the application under the Act, and that the other contentions raised were upon questions of fact and not points of law.

The question for the opinion of the Court was whether the order was legally and properly made. (1)

Shearman, for the respondent. There is a preliminary objection to the hearing of this appeal. The only appeal is to the Probate Division under s. 11 of the Act of 1895. That Act

(1) By the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4, "Any married woman whose husband shall have . . . . deserted her, or whose husband shall have been guilty of . . . . wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such . . . . neglect have caused her to leave and live separately and apart from him," may apply to a court of summary jurisdiction for an order under the Act.

By s. 11, "Save as is hereinbefore provided, an appeal shall lie from any order or the refusal of any order by a court of summary jurisdiction under this Act to the Probate, Divorce and Admiralty Division of the High Court of Justice."

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confers a new statutory jurisdiction on courts of summary jurisdiction, and the only appeal is that given by the Act creating the jurisdiction. Further, the decision in *Swoffer* v. *Swoffer* (1) shews that the procedure in these appeals is by motion and not by case stated.

T. Hollis Walker, for the appellant. There is nothing in the Act of 1895 which expressly takes away the ordinary right to have a case stated under the Summary Jurisdiction Acts upon a point of law, while by various sections of the Act, and especially by s. 8, those Acts are incorporated in the present Act. The appeal to the Probate Division given by s. 11 is very different in its nature from a case stated: it is an appeal upon facts as well as upon law, and was intended to take the place of the appeal to quarter sessions. The proceeding by case stated is not an appeal at all in the proper sense of the term; it is a proceeding by which the justices can consult with and obtain the decision of the High Court upon a point of law as to which they are in some doubt; the jurisdiction exercised by the High Court is in effect consultative, the facts being found upon which the Court gives its decision, whereas every appeal is a rehearing. There is no reason for saying that the two proceedings are inconsistent with each other, and they may both be adopted: *Hetherington* v. *Hetherington* (2); though here only one course has been taken. The two modes of appeal may co-exist: *Power* v. *Wigmore* (3), where Willes J. says (4): "It must not be assumed that because an appeal is given under another Act of Parliament, the magistrate may not state a case for the opinion of the Court under 20 & 21 Vict. c. 43"; and again (5): "The fact of parties having a right of appeal under s. 106 of the Building Act, and the fact of the magistrate having jurisdiction to allow an appeal, if he thinks proper, under 20 & 21 Vict. c. 43, are by no means inconsistent; the two powers may well co-exist."

As to the point of substance, the order was wrongly made. The husband and wife were living apart under an agreement

(1) [1896] P. 131.
(2) (1887) 12 P. D. 112; 51 J. P. 119.
(3) (1872) L. R. 7 C. P. 386.
(4) L. R. 7 C. P. at p. 388.
(5) L. R. 7 C. P. at p. 391.

for separation, and it is clear that there cannot be desertion while the parties are living apart unless there be first a resumption of cohabitation: *Fitzgerald* v. *Fitzgerald* (1); *Reg.* v. *Leresche* (2); *Bradshaw* v. *Bradshaw* (3); while the essential factor in the case of causing the wife to leave is the same as that in the case of desertion. There cannot be a leaving on the part of the wife caused by the husband without a resumption of cohabitation, and the occurrences of October 28 did not amount to such resumption. Refusal to resume cohabitation does not constitute desertion: *Reg.* v. *Leresche*. (2) Further, the summons was bad: the words "leave and," which are essential, were omitted; to "cause to live apart" is not sufficient to give jurisdiction under s. 4.

Shearman, for the respondent. The last objection is cured by 11 & 12 Vict. c. 43, s. 1, which provides that no objection to a summons shall be allowed for want of form. Sect. 4 of the Act of 1895 was drawn for the express purpose of getting over the objection raised by the appellant, for it includes "causing to leave," and there must be cases of conduct by which the wife is caused to leave her husband which are not equivalent to desertion. It would be useless to pass a wider Act if every fact which is an answer to a charge of desertion is also an answer to the charge of "causing to leave" under the later Act. It is not necessary that there should be actual cohabitation at the time of the offence, and there is constructive cohabitation if the husband does not comply with the terms of the separation deed and leaves his wife destitute. The occurrences of October 28 shew a sufficient resumption of cohabitation to give jurisdiction.

WRIGHT J. I am of opinion that the only appeal is that under s. 11 of the Act of 1895 to the Probate, Divorce and Admiralty Division, though it is extremely difficult to know whether that was what the Legislature intended, and I give my opinion with no great confidence.

We start with the general principle that when an Act of

(1) (1869) L. R. 1 P. & M. 694. (2) [1891] 2 Q. B. 418.
(3) [1897] P. 24.

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Parliament confers a new jurisdiction upon a court there is no appeal unless in the statute creating the jurisdiction or in some other statute an appeal is given. In many cases there used formerly to be no appeal from a decision of a court of summary jurisdiction, and the only remedy was by certiorari. We must see, therefore, from the language of the Act what appeal it was intended to give. This Act creates a new jurisdiction, and in a separate section it expressly gives a right of appeal to the Probate, Divorce and Admiralty Division; it seems to be a reasonable construction that the Legislature intended to allow no other form of appeal. It was argued with great force on behalf of the appellant that a mere reference in this statute to the Summary Jurisdiction Act imports a right of appeal by special case under that Act. But if the provisions of the Summary Jurisdiction Act are to be generally imported into the Act of 1895, a right of appeal to quarter sessions would also be imported; but that cannot be a correct view, for there could not be an appeal to the Probate, Divorce and Admiralty Division side by side with an appeal to quarter sessions. The language of the Summary Jurisdiction Act giving a right to have a case stated is not expressly incorporated in the new statute, nor are there such words in the later Act as have been held in previous decisions to amount to incorporation; in fact, the references in the new Act to the Summary Jurisdiction Act are carefully limited. In s. 4 provision is made for an application by the wife to a court of summary jurisdiction; by s. 5 a court of summary jurisdiction has power to make orders under the Act; s. 7 gives such court power to vary or discharge its order already made; and s. 8 provides that application under this Act are to be made in accordance with the Summary Jurisdiction Acts. If there were no special section in the Act relating to appeals I should say that s. 8 would incorporate the provisions of the Summary Jurisdiction Act in that respect. The provisions of s. 10 are very peculiar: if in the opinion of a court of summary jurisdiction the matters in question between the parties would be more conveniently dealt with by the High Court, the court of summary jurisdiction may refuse to make an order, and from that decision no appeal lies; but there is a

proviso that the High Court or a judge may direct the court of summary jurisdiction to rehear and determine the matter. Then comes s. 11, which gives an appeal to the Probate Division "save as is hereinbefore provided." I agree that the two forms of appeal, a case stated under the Summary Jurisdiction Acts and an appeal under s. 11 of this Act, *may* co-exist; but, as I have already intimated, I incline to the opinion that they do not. The question is one, however, of great difficulty, and I am happy to think that the case is one in which we have power to give leave to appeal.

As to the other point raised in the case, I also feel very great difficulty. It seems to me a technical view to hold that the words of s. 4 are not satisfied, and I cannot help thinking that the Legislature intended to use words which should apply to cases where there has technically been no desertion. However, under the circumstances, the question does not arise, and I desire to express no opinion upon it.

BRUCE J. I am of the same opinion. It seems to me a reasonable conclusion that an appeal under s. 11 is the only mode of appeal contemplated by the Act. This conclusion is, I think, aided by a consideration of the provisions of the Matrimonial Causes Act, 1878, by which power was given to justices in certain cases to make orders of a summary nature, which by s. 4 were to be "subject to appeal to the Probate and Admiralty Division of the High Court of Justice": this expression seems to mean that they were to be subject *only* to an appeal to that division. And the language of s. 11 of the Act of 1895, though not identical, is very similar, and does not, I think, give a double appeal. The inconvenience of a double proceeding by way of appeal was shewn in *Hetherington* v. *Hetherington* (1): in that case the proceeding by way of special case was ultimately abandoned, and the President of the Probate, Divorce and Admiralty Division held his hand in the appeal brought in that Division until such abandonment. Since 1878 there is no recorded instance of an appeal having been carried under that Act to the Queen's Bench Division, and that very fact is some

(1) 12 P. D. 112; 51 J. P. 119, 294.

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evidence to shew that it was not intended that an appeal should lie here.

Appeal dismissed. Leave to appeal.

Solicitor for appellant: *Elwes, for Haddon Owen, Louth.*
Solicitor for respondent: *Wyles, for Barker, Grimsby.*

W. J. B.

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[IN THE COURT OF APPEAL.]

WORCESTERSHIRE COUNTY COUNCIL, APPELLANTS; ASSESSMENT COMMITTEE OF THE WORCESTER POOR LAW UNION AND OVERSEERS OF THE PARISH OF ST. NICHOLAS, IN THE CITY OF WORCESTER, RESPONDENTS.

Poor-rate—Exemption—Exclusive User for Service of Crown—Joint Occupation by Quarter Sessions and County Council.

The exemption from rateability to the relief of the poor of property in the occupation of persons using it for the service of the Crown applies only where the property is exclusively used for such service.

CASE stated by consent on an appeal to quarter sessions against a rate for the relief of the poor.

Under a local Act the justices of the peace for the county of Worcester erected a building known as the Shire Hall, to serve as a county hall, courts of justice, offices, and judges' lodgings; and in *Reg.* v. *Justices of Worcestershire* (1) it was decided that the justices were not liable to be rated to the relief of the poor in respect of such premises.

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 64, the property in the Shire Hall became vested in the county council of Worcestershire.

In April, 1896, the appellants, the county council, were assessed to the poor-rate for the parish of St. Nicholas, as occupiers of such portions of the Shire Hall as they used either exclusively or jointly with the justices. In the latter case the

(1) (1839) 11 A. & E. 57.

total gross estimated rental was apportioned in proportion to the value of the user of the justices and the county council respectively, and the county council were rated in respect only of the amount apportioned to their user. It was agreed that if the premises or any part of them were liable to be rated, the amounts at which they were rated, and the apportionments as set out in the case, should stand. Such parts of the Shire Hall as were exclusively used by the justices were not included in the assessment.

The question for the opinion of the Court was whether the county council were liable to be rated in respect of the premises or any part thereof.

The Divisional Court (Wright and Bruce JJ.) gave judgment in favour of the respondents, upholding the rate.

The appellants appealed.

Alfred Young and *C. F. Vachell*, for the appellants, contended that the user of the justices, at all events so far as such user was for judicial purposes, exempted the portions of the Shire Hall so used from rateability, and cited *County Council of Middlesex* v. *Assessment Committee of St. George's Union* (1); *Nicholson* v. *Holborn Union*. (2)

Bosanquet, Q.C. (*Richard Harington* with him), for the respondents, contended that exemption from poor-rates arose only in cases of exclusive occupation for Crown purposes, and cited the opinion of Lord Cairns C. in *Greig* v. *University of Edinburgh* (3) to that effect.

LORD ESHER M.R. In this case parts of the Shire Hall of the county of Worcester have been rated to the poor, and the persons rated are the county council of Worcestershire. There is a part of the hall which is not rated which, as I understand, is used exclusively for the holding of courts of quarter sessions and assizes and other judicial work. It is undoubted that by virtue of the Local Government Act, 1888, the owners of the premises are the county council, and that they use for county

(1) [1897] 1 Q. B. 64.
(2) (1886) 18 Q. B. D. 161.
(3) (1868) L. R. 1 H. L., Sc. 348, at p. 350.

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Lord Esher M.R.

purposes all the parts of the hall which have been rated. It is stated that on certain occasions some of these are used by the justices for judicial purposes, and it is urged that because that is the case the county council cannot be rated in respect of them. Those parts have not been rated at their full value; but the value was apportioned according to the use of them by the county council and the justices, and the council are charged in respect of the value of their user only. The figures have been agreed on, and we are not asked in this case whether they have been underrated; so that the question of dealing with the figures and determining whether the county council should not be rated at the full value does not arise, though it may arise hereafter.

The rule which governs the present case is that laid down by Lord Cairns in *Greig* v. *University of Edinburgh* (1), where the Chancellor stated the rule as to exemption from rating, which he said had already been approved by the House of Lords in the cases he mentions. He states the rule thus: "The Crown, not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor." In the case before us the premises were not used exclusively for the service of the Crown, and so do not come within the exemption, and are therefore rateable. It is said that the decision in *Nicholson* v. *Holborn Union* (2) is opposed to this view. I do not think it necessary at present to determine whether that is the case; but if it is that decision must be taken as overruled.

LOPES L.J. I am of the same opinion. According to the rule laid down in the House of Lords, in the opinion of Lord Cairns which has been quoted by the Master of the Rolls, property which is in the occupation of the Crown is exempt from rateability to the relief of the poor on the ground that the Crown is not named in the statute. The exemption extends to the case of property in the occupation of persons using it

(1) L. R. 1 H. L., Sc. 348, at p. 350. (2) 18 Q. B. D. 161.

exclusively in and for the service of the Crown. This condition of exclusive user is not present in this case; and I think, therefore, that the exemption does not apply.

CHITTY L.J. The facts of this case shew that it cannot be brought within the principle laid down by Lord Cairns, that property occupied by persons using it exclusively for the service of the Crown is exempt from being rated. There is no such exclusive user by the county council, and they cannot claim to be exempt. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Clarke & Blundell, for S. Thornely, Worcester.*

Solicitor for respondents: *G. A. Hall, for A. W. Knott, Worcester.*

A. M.

[IN THE COURT OF APPEAL.]

HILL (VISCOUNT) *v.* HILL (DOWAGER VISCOUNTESS).

Trust—Precatory Trust—Words of Request—Heirlooms.

The widow of a peer stated in a letter or memorandum sent to her solicitor that certain diamonds had been given to her upon her marriage by the mother of her husband, then heir-presumptive to the peerage, for her life with the request that at her death they might be left as heirlooms:—

Held, that the terms of the gift as stated did not import a precatory trust, and therefore that the absolute property in the diamonds passed under it to the donee.

APPEAL from the judgment of Collins J. at the trial before him without a jury.

The action was brought by the plaintiff, the fourth viscount Hill, to recover possession of a diamond necklace, pendant, and ear-rings, from the defendant, his stepmother, who had been

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the second wife of his father, Rowland Clegg Hill, the third viscount.

The plaintiff claimed the diamonds under the will of his grandmother, Ann Hill, whose maiden name was Clegg, and who in 1831, being then sixteen years of age, married Rowland Hill, the nephew of the first viscount, General Hill, who was then living. The peerage was limited to General Hill and his issue male, and in default of such issue it passed to collaterals. At the time of his marriage Rowland Hill was heir-presumptive to the peerage, and upon the death of the first viscount without male issue in 1842, he became the second viscount. Rowland Clegg Hill, the plaintiff's father, was born of the marriage between Rowland Hill and Ann Clegg in 1833, and upon the death of his father in 1875 became the third viscount. The plaintiff was born in 1863. In 1890 the dowager viscountess Ann Hill sent a letter or memorandum to her solicitor, which, so far as material, was as follows. "Relating to diamonds. The original family diamonds consisted of a necklace, ear-rings, and two clasps, to which were added a few more diamonds and made into a large pendant or brooch to be attached to the necklace or not at pleasure. My mother-in-law, Mrs. Hill, told me that Sir Richard Hill gave them to her without any restriction. When I married, she gave them to me for my life with the request that at my death they might be left as heirlooms." By her will, made May 25, 1891, the dowager viscountess Ann bequeathed the diamonds in question to her son Rowland Clegg Hill, the third viscount, until he should die, and after his death to each and every of the persons who should in turn succeed to the title and dignity of viscount Hill, or any other title or dignity which might be granted to or assumed by any person for the time being entitled to the said title and dignity of viscount Hill, severally and successively as they should in turn succeed to such title and dignity as aforesaid, her intention being that the said diamonds should descend as heirlooms as far as the rules of law and equity would permit.

The testatrix died on October 31, 1891. In 1895 plaintiff's father, Rowland Clegg Hill, the third viscount, died. The contention for the defendant was that the terms of the gift

to the dowager Ann imported a precatory trust under which she only took a life interest and the diamonds became after her death the absolute property of the defendant's husband, the third viscount, and she claimed them by virtue of a gift from him.

The learned judge gave judgment for the defendant.

Jan. 19, 20. *Cozens-Hardy, Q.C., Jelf, Q.C.*, and *H. J. Rowlands* with him, for the plaintiff. The terms of request which accompanied the gift by Mrs. Hill to the testatrix, the dowager viscountess Ann, as stated in the memorandum, must under the circumstances be construed according to their natural meaning and not as importing a precatory trust. So construed, the gift amounts in law and equity to an absolute gift to her. Even if a precatory trust were created, it was such that the testatrix had under it power to make an appointment by will in favour of the plaintiff as succeeding to the title, and, the plaintiff having been born in her lifetime, there was no contravention of the rule against perpetuities.

Warmington, Q.C., and *A. Powell* (*Keeling* with them), for the defendant. The words of request contained in the terms of the gift of the diamonds to the dowager Ann, as stated by herself in the letter or memorandum sent by her to her solicitor, imported a precatory trust of the diamonds, the objects of which are sufficiently defined by the word "heirlooms." It is contended that the trust was for the dowager Ann for life with a special equitable power of appointment by will in favour of her son Rowland Clegg Hill, and an implied trust that, in default of such an appointment, the diamonds should pass to him absolutely at her death, if he was alive and entitled to the peerage in possession; or the terms of the gift may be construed as importing a trust that, after her death, the diamonds should become heirlooms and go with the title so far as the law permits chattels to be so settled; that is to say, a trust in favour of the second viscount for life, and after his death in favour of Rowland Clegg Hill, the third viscount absolutely. The exercise of any supposed power of appointment by the dowager Ann cannot carry the trust limitations further than the settlor, Mrs. Hill,

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herself could have done, and she could not have carried them beyond the third viscount without contravening the rule as to perpetuities.

Cozens-Hardy, Q.C., in reply.

[The authorities cited are referred to in the judgments.]

Cur. adv. vult.

Feb. 19. The following judgments were delivered.

LORD ESHER M.R. I have read the judgments about to be delivered by Lopes L.J. and Chitty L.J., and I entirely agree with them. I therefore propose to say very little in addition on my own account. I have the strongest conviction that, when the Court is called upon to place a construction upon words spoken or written for the purpose of adjudicating upon them, the same rule applies in courts of equity as in courts of law, namely, that the words must have their ordinary signification, unless in the particular case there is something which obliges the Court to give them a meaning other than their ordinary meaning. The words which we have to consider in this case are words of request. Words of request in their ordinary meaning convey a mere request, and do not convey a legal obligation of any kind either at law or in equity. But in any particular case there may be circumstances which would oblige the Court to say that such words have a meaning beyond their ordinary meaning, and import a legal obligation. Upon the construction of wills there have been very many cases before equity judges, and in many of those cases the judges decided that in the particular case words of request were to be construed as bearing a meaning beyond their ordinary meaning of request, and as imposing an obligatory trust. I do not propose to examine or to criticise any of those cases, or to say that any of them was wrongly decided on the facts of the case. But, having considered them, I am unable to find any rule of law laid down which obliges a judge in any particular case to give a meaning other than their ordinary meaning to words of request. In the present case I cannot find any fact or circum-

stance which entitles the Court to carry the meaning of the words of request beyond their ordinary meaning. Where there are words prior to the words of request which, if they stood alone, would give well known legal or equitable rights, and afterwards there come words of request, it appears to me that the strongest possible circumstances would be required to enable the Court to say that those words of request are to cut down the prior words giving the legal or equitable rights, and impose an obligation. The words in the present case are not words in a will or any other instrument. They are words which are contained in an account of a conversation which took place many years previously. Anything more dangerous than to act upon those words as bearing a sense other than their ordinary sense cannot be imagined. It does not appear that the statement gives the whole of the conversation that took place. It would be in the highest degree dangerous under the circumstances to impute an intention which is not actually expressed in the words used. I am for these reasons unable to agree with the conclusion arrived at by the learned judge at the trial, and I therefore think the appeal must be allowed.

LOPES L.J. read the following judgment:—This case depends upon the construction of a letter or memorandum, which is admissible in evidence as being a declaration against the interest of the person making it. This document was sent by the dowager Ann viscountess Hill to her solicitor in 1890, and appears to be a statement by her as to what was said to her by her mother-in-law, Mrs. Hill, on the occasion of her marriage with Rowland, the second viscount, in 1831. The dowager Ann died in 1891, leaving a will which was made a short time before her death and by which she bequeathed the diamonds to her son, Rowland Clegg Hill, the third viscount, until his death, and after his death to each and every person who should succeed to the dignity severally and successively as they should in turn succeed to it, her intention being that the diamonds should descend as heirlooms so far as the rules of law and equity would permit. Her son, the third viscount, survived her, and died in 1895. He was succeeded by his son, the fourth

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viscount, who was born in 1863 (in the lifetime of the testatrix) and is the plaintiff in this action. The defendant is the second wife of the third viscount Hill, who claims these diamonds as a gift from him, he having, as she contends, power to dispose of them as he thought fit. The learned judge in the Court below says: "I have reluctantly arrived at the conclusion that there has been a gift not absolute to Ann Clegg, but a gift for life only with a trust, a precatory trust, that she shall by her will, as far as possible, absolutely constitute these things as heirlooms to go with the title." I cannot agree with the learned judge. The two questions to be considered seem to me to be —first, had the dowager Ann any power to dispose of these diamonds, or were they subject to a precatory trust; and secondly, if she had an absolute power to dispose of them, and they were not subject to a precatory trust, is there anything in the disposition she has made of them by her will which transgresses the rule against perpetuities.

It must be conceded that, if there is no precatory trust, the property in these diamonds vested absolutely in the dowager Ann, and that she had power to deal with them as she has done provided the rules against perpetuities are not violated. Is there a precatory trust created by the document in question? Whether a precatory trust can be created by word of mouth or by anything less than a will, it is unnecessary to consider, because I do not think that the words used here, even if occurring in a will, would create such a trust. The doctrine of precatory trusts is a creature of equity, by whose aid the intentions of testators, in my judgment, have too frequently been defeated. I agree with James L.J. in *Lambe* v. *Eames* (1), when he says: "In hearing case after case cited I could not help feeling that the officious kindness of the Court of Chancery, in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed." It is inconceivable to me that a testator, who really meant his hope, recommendation, confidence, or request to be imperative should not express his intention in a mandatory form. I agree with Mr. Farwell in his

(1) (1871) L. R. 6 Ch. 597.

book on Powers, when he says, at p. 480: "It would not be a very strained inference to regard all such expressions as stating the motive that induced the absolute gift rather than as a fetter imposed upon it." As the authorities now stand, if the gift to the countess Ann had been absolute it would have been impossible to hold that the subsequent words created a precatory trust. The difficulty here, if there is any, is the words "for my life" and "at my death they might be left." It is in every case a question of intention, and the whole document with the surrounding circumstances must be considered. Cotton L.J., in *In re Adams and Kensington Vestry* (1), says: "Having regard to the later decisions, we must not extend the old cases in any way or rely upon the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect and what was the intention of the testator as expressed in his will." Adopting that view, I come to the conclusion that it was never intended to fetter the disposition of the diamonds by the countess Ann, and that they were given absolutely to her, but that a wish was expressed that after using them for her life she should by will dispose of them so that they should follow the title, not intending to govern the discretion of the person whom the donor was addressing, but indicating only what would be in her opinion a reasonable exercise of that discretion. The reference to the will of the countess Ann by which she is asked to dispose of the diamonds after her death indicates a discretion reposed in her. Another objection might be taken to the precatory trust, namely, that the object of it, signified only by the word "heirlooms," is too uncertain to make such a trust maintainable.

If I am right in my view of the precatory trust, then the countess Ann had power to dispose of the diamonds by her will, and in the events which have happened the rule against perpetuities is not transgressed, because the plaintiff was born in the lifetime of the countess Ann. This conclusion, it is satisfactory to think, gives effect to what was obviously the intention, namely, that these diamonds should accompany the title. The appeal must be allowed.

(1) (1884) 27 Ch. D. 394, at p. 410.

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CHITTY L.J. read the following judgment:—The plaintiff claims the diamond necklace, pendants, and ear-rings in question under the will of the dowager viscountess Ann Hill, whose maiden name was Ann Clegg. She died in 1891, having made her will in the same year, a short time before her death. By this will she bequeathed the diamonds to her son, Rowland Clegg Hill, the third viscount, until his death, and, after his death, to each and every person who should succeed to the dignity severally and successively as they should in turn succeed to it, her intention being that the diamonds should descend as heirlooms as far as the rules of law and equity would permit. Her son, the third viscount, survived her and died in 1895. He was succeeded in the dignity by his son, the plaintiff, who was born in the lifetime of the testatrix. There is, therefore, no question of perpetuity arising on this will, considered apart from the document on which the question principally turns. Subject to the rule against perpetuities, chattels may be settled to follow the devolution of a dignity: see *In re Rivett-Carnac's Will.* (1)

Now the plaintiff's claim is established—(1.) if the diamonds were the property of the dowager Ann; (2.) if she had a general and unrestricted power to dispose of them by will; and (3.) if she had power by will to make such a disposition of them as she has in fact made. No objection was raised to the plaintiff's claim on the ground that it was merely equitable, or that the property at law in the chattels passed to the executor of the testatrix. The only objection raised was that by reason of a prior settlement, alleged to have been made in 1831, the dowager had no power to bequeath the diamonds to the plaintiff. We are not called upon, therefore, to consider a question which has been suggested in a learned text-book as to the effect of the Judicature Act of 1873 upon a gift of chattels by will made since that Act: see Williams on Personal Property, 11th ed. pp. 308–310.

The defendant's case rests on the letter or memorandum sent by the dowager Ann to her solicitor in 1890. The circumstances under which, or the purpose for which it was written

(1) (1885) 30 Ch. D. 136.

are not disclosed by the evidence. It purports to be a narrative of what Mrs. Hill said when she delivered the diamonds to the dowager on the occasion of her marriage with Rowland Hill, who was Mrs. Hill's son. The marriage took place in 1831, when the dowager was sixteen years of age. As the law then stood, she had capacity to make a will of personal property. The memorandum is set up by the defendant as an admission by the dowager Ann against her interest. So far as material it runs thus: "Relating to diamonds. The original family diamonds consisted of a necklace, ear-rings, and two clasps, to which were added a few more diamonds and made into a large pendant or brooch to be attached to the necklace or not at pleasure. My mother-in-law, Mrs. Hill, told me that Sir Richard Hill gave them to her without any restriction. When I married, she gave them to me for my life with the request that at my death they might be left as heirlooms." The diamonds are here spoken of as "family diamonds." The Sir Richard Hill referred to was the father of Mrs. Hill's husband, John Hill, who had died in 1814. Sir Richard had given these "family diamonds" to Mrs. Hill without any restriction. Regard being had to the argument for the defendant, it is convenient here to refer to the state of the Hill family. In 1831 General Hill, the first viscount, was living. He did not die until 1842. The dignity was limited to him and his issue male in the usual way; in default of such issue it passed to collaterals, so that, on the death of the first viscount without issue male, it descended to his nephew Rowland, husband of the dowager Ann. It would seem that in 1831 there was no issue male of the first viscount living, and consequently that Rowland Hill was, at the time of his marriage, heir-presumptive to the dignity. The son of the marriage of Rowland Hill with Ann Clegg was Rowland Clegg Hill, born in 1833. On the death of his father in 1875 he became the third viscount. He is the viscount named in the will of the dowager Ann as the person to whom the diamonds were thereby bequeathed until his death.

The defendant's counsel have buried this apparently simple document under a mass of technical learning; and, by reference

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to the subtle equitable doctrines of precatory trust, special power of appointment, and implied trust in default of exercise of the power, have endeavoured to convert it into a strict settlement of some kind, the trusts whereof (as will presently appear) they are unable to state in clear or satisfactory terms. They contend that by virtue of these trusts the property in the diamonds vested absolutely in the third viscount. Mrs. Hill herself, if alive, would, I think, be much surprised at the interpretation which the defendant's counsel have put upon the words she is stated to have used. The dowager Ann did not so understand them. In disposing of the diamonds by her will she described them as "my diamonds." Still we must take it that the words stated were those actually used by Mrs. Hill, and our task is to put a reasonable and intelligible meaning upon them.

At the outset I am struck by two things. First, this was a marriage present of jewels. It is not usual to settle such a marriage gift. Secondly, it is difficult to understand why Mrs. Hill, if she really intended to make a binding settlement, did not put it into the form of a deed, or at all events reduce it into writing, instead of leaving it to depend on the slippery testimony of human memory. But, taking Mrs. Hill's words as stated, and merely changing the oblique form of narrative into the direct, they stand thus: "I give these diamonds to you for your life with the request that at your death they may be left as heirlooms." The request was therefore made to the dowager Ann: the word "left" imports a will; and the will was to be her will. About this there was no contest at the Bar. Nor was it in contest that the effect of the gift was to pass to the dowager Ann the absolute property at law in the chattels. There was no reservation of any kind in favour of Mrs. Hill herself: she entirely parted with the property. As the common law does not recognise such a thing as an estate in a chattel, a gift of a chattel for life accompanied by delivery passes the property at law. Starting from this point, the argument for the defendant was that in equity the dowager Ann took a life interest in the diamonds, and that after her death there arose a precatory trust, as it is termed. The term is an awkward one, but its meaning is clear. Courts of equity have held that words

primâ facie expressive of request, entreaty, wish, hope, and the like may be read as words of command, creating a trust. It is merely a question of the construction of the particular instrument, or, as here, the set of words used, taken in connection with any surrounding circumstances that may be legitimately brought into consideration. I entirely concur in the statement of the principle on which the Courts now act contained in the judgment of Lindley L.J. in *In re Hamilton*. (1) He was dealing with the case of a will. It is on wills only, so far as I am aware, that these questions of precatory trust have been raised. He says that you must take the will which you have to construe and see what it means, and, if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar to the one you have before you. In the case before us the term "trust" does not occur. A trust undoubtedly may be created by any apt words; but the circumstance that the well understood and obvious term "trust" is not used seems to me to be worthy of some consideration where the question is whether a trust is or is not intended to be created. Now it is incumbent on those who claim that there is a trust, whether created by precatory words or otherwise, to point out with reasonable certainty who are the objects of the trust. These objects must be ascertained from the words used construed reasonably. The defendant's counsel relied on the word "request" as shewing the trust and the word "heirlooms" as defining the objects. It was said, at first, in a general way, that the trust was for the dowager Ann for her life, and that she had a special and restricted equitable power of appointing the chattels by will in favour of a particular person, with an implied trust for the same person in default of appointment. I pressed Mr. Warmington, who is a learned conveyancer, to set out at large the terms of the supposed settlement. His answer, as I understood it, was that the dowager had a testamentary power of appointing the diamonds to her son, the third viscount, and, in default of such an appointment, the diamonds passed to him absolutely, if at her death he was alive and entitled to the

(1) [1895] 2 Ch. 370.

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dignity in possession. With all respect to the learned counsel, this was an arbitrary, narrow, and absurd settlement, and one which cannot be extracted from the words. I will deal presently with the words "as heirlooms." According to this construction the dowager Ann had, in effect, no power at all: she had no voice in the disposition of the jewels; no choice or power of selection at all. It was immaterial whether she made a will or not: the third viscount, her son, was to take in either event. Of course he could not have taken under her will, if he had died in her lifetime, an event which might well have happened. Dissatisfied with the settlement stated by Mr. Warmington, Mr. Powell tried his hand at drawing the settlement in extenso. He said, as I understood him, that the second viscount (who was not viscount in 1831) took for his life, and after his death the diamonds passed to his son, the third viscount. He endeavoured to connect the diamonds in some unexplained way with the descent of the dignity; but he shrank from this, for he deliberately cut out the first viscount and his issue male. He could make nothing of the supposed testamentary power, nor give any satisfactory reason for excluding the first viscount, who was living in 1831, and might have left issue male to succeed to the dignity. It was not from want of skill that the defendant's counsel failed to draw out any satisfactory or reasonable settlement by way of trust.

As reliance was placed on the words "as heirlooms," it is necessary to say a few words on the meaning and effect of the term "heirlooms." The meaning of the word standing alone, without any explanatory context, in reference to chattels in gross (I am not speaking of fixtures), is the same in law and in equity. Its primary meaning is chattels which on the death of the ancestor pass to the heir. These are of two classes. The first is where they pass by special custom, such as the best bed and the like. The second is where the chattels, to use the old phrase, savour of the inheritance; that is are directly connected with it. This class includes title-deeds and the chest or box where they are usually kept, the patent creating a dignity, the garter and collar of a knight, an ancient horn where the tenure is by cornage, as in the case of the Pusey

horn, and the ancient jewels of the Crown. As the special custom has to be proved strictly, little or nothing is heard at the present day of the first class. For this statement of the law it is unnecessary to cite authorities. I refer however to Co. Litt. 18 b and 1 Williams on Executors, 9th ed. p. 633, et seq., in which latter work the subject is fully treated. But there is a secondary sense in which the term "heirlooms" is used; that is, where chattels are settled by deed or will or otherwise, vesting them in trustees upon trusts declared whereby they are limited to go along with corporeal or incorporeal hereditaments, so far as the rules of law or equity will permit. This secondary sense is, speaking generally, the sense in which the term "heirlooms" is employed popularly, and also by lawyers as a brief description. As an instance of the latter, I refer to the 37th section of the Settled Land Act, 1882, where the marginal note (which forms no part of the enactment) is "heirlooms." The word itself does not occur in the text, which speaks of personal chattels settled on trust so as to devolve with land. But the chattels thus settled are both at law and in equity still chattels; and, as neither law nor equity knows of such a thing as an estate in a chattel or a remainder in the proper sense of those artificial terms, it follows that the chattels so settled, retaining their character of chattels, are, like any other personal property, subject to the general rule against perpetuities. Accordingly, in compliance with this rule, the property in the chattels must vest absolutely within lives in being and twenty-one years afterwards. Consequently, in well drawn settlements, regard being had to another rule of law that words which create an estate tail in realty confer the absolute property in personalty, a provision is usually inserted that the chattels shall not vest in an unborn person who takes an estate tail in the realty by purchase unless he attains the age of twenty-one years. All these propositions are well established: I am led into stating them by the argument for the defendant. There is another proposition of law, that a man cannot change the general law, and impart to a chattel a descendible quality, except in some such manner as already stated. He cannot turn a chattel into freehold land. Accordingly,

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if A. gives a chattel to B., and merely says that B. is to have it as an heirloom, no force (in the absence of any context or special circumstance) can be attributed to the word "heirloom." Such was the opinion of Lord Hatherley in *Shelley* v. *Shelley* (1), and such was the decision in *In re Johnston*. (2)

Now the words used by Mrs. Hill did not expressly annex the diamonds to the dignity, nor can any such intention be reasonably imputed to her in the circumstances of the case. She certainly did not mean that the dowager Ann should bequeath them to the first viscount or his issue male. Nothing could be further from her intention in making the gift to the young girl who was or was about to become the wife of her son. To my mind it is absurd to say that she intended that the jewels should pass in any definite order or course of limitation. No such order or course can be reasonably extracted from the words used or the circumstances under which the gift was made.

The learned judge who was called upon to decide this case on Circuit came reluctantly to a conclusion in favour of the defendant. His view was that the dowager Ann took a life interest in the diamonds with a trust to create them heirlooms as far as she could. If this be the correct view (which I think it is not), then, inasmuch as the plaintiff was living at her death, the gift in her will, down to and including the plaintiff, was not in contravention of the rule against perpetuities and was a valid appointment in favour of the plaintiff. Where there is a power of appointment in favour of objects of whom some are within and some are without the limits allowed by the rule against perpetuities, an appointment to objects within the limits is valid.

The sum of the case appears to me to be this. The property at law vested in Ann Clegg by virtue of the gift, and I think in equity also. She was to have the use and enjoyment of the diamonds during her life, and she had the right to dispose of them by will. She was bound in honour to Mrs. Hill not to sell them or to give them away by will to strangers, but to leave them as heirlooms by keeping them in the family with which

(1) (1868) L. R. 6 Eq. 540. (2) (1884) 26 Ch. D. 538.

she became connected by her marriage. The word "request" may in certain cases by reason of a context be sufficient to create a trust, but it would be contrary to the true meaning of Mrs. Hill to hold that any trust or other binding obligation was here created. In the circumstances of the case it would be unreasonable to suppose that Mrs. Hill by her loose and inartificial words intended to impose any trust on Ann Clegg. The request must be taken in its ordinary and natural sense, and not in its extraordinary and unnatural sense of a command. No special sense can be attributed to the words "as heirlooms." What is meant in a general way was just what was said: "You are to leave them as heirlooms." If these words had any force as a condition (I think they have not), then the dowager Ann has by her will complied with the condition; she has done exactly what was intended; she has left them as heirlooms.

For these reasons I hold that the plaintiff's claim is established.

Appeal allowed.

Solicitors for plaintiff: *Stibbard, Gibson & Co., for Rowlands & Co., Birmingham.*

Solicitors for defendant: *Dunkerton & Son, for Picton-Jones & Roberts, Pwllheli.*

E. L.

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Jan. 15.

THE QUEEN *v.* THE GUARDIANS OF THE LEWISHAM UNION.

Mandamus—Prosecutor—Legal Right to apply for Mandamus—Vaccination Acts, 1867 to 1874—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76)—General Order of Local Government Board under Vaccination Acts (Oct. 31, 1874).

A metropolitan district board of works applied for a mandamus to the guardians of the poor of the district, commanding them to enforce the provisions of the Vaccination Acts generally in their district, and particularly in certain specified instances. The board of works were the sanitary authority of the district, and charged by the Public Health (London) Act, 1891, with the duty of putting in force the powers vested in them relating to public health and local government, some of which powers relate to and include the prevention of infectious diseases, including small-pox:—

Held, that the board of works had no legal specific right to enforce the performance by the guardians of their duties under the Vaccination Acts, and therefore were not entitled to a mandamus.

RULE, obtained on behalf of the Lewisham District Board of Works, for a mandamus to the guardians of the poor of the Lewisham Union, commanding them to enforce the provisions of the Vaccination Acts generally in their district, and particularly in certain specified instances.

By the Vaccination Acts, 1867 (30 & 31 Vict. c. 84) and 1871 (34 & 35 Vict. c. 98), guardians of unions are directed to take measures to secure the due vaccination of persons within their district by the public vaccinator, and to appoint and pay vaccination officers to prosecute persons charged with offences against the Vaccination Acts.

By article 16 of the General Order of the Local Government Board, dated October 31, 1874, made in pursuance of the powers given by the Vaccination Acts, 1871, s. 5, and 1874 (37 & 38 Vict. c. 75), s. 1, "the guardians shall in all cases in which the provisions of the Vaccination Acts for enforcing vaccination have been neglected cause proceedings to be taken against the persons in default, and for this purpose shall give directions authorizing the vaccination officer to institute and conduct such proceedings."

The Lewisham District Board of Works is constituted under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and the Acts amending the same, and is the sanitary authority of their district. The Lewisham district includes the parish of Lewisham, which is within the Lewisham Union.

By the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 1, "it shall be the duty of every sanitary authority . . . . to put in force the powers vested in them relating to public health and local government."

Those powers relate to and include such matters as are dealt with in ss. 55 to 93 of the Public Health (London) Act, 1891 — some of which are the notification and prevention of infectious diseases, including small-pox, the cleansing and disinfecting of the bedding and clothing of infected persons, and the cleansing and disinfecting of infected premises, the removal of such persons to hospitals, the removal of the bodies of persons who have died of infectious disease, the provision of hospital ambulances and mortuaries, the supply of medicine and medical assistance to the poor of the district, and the execution of the regulations for the time being in force in relation to epidemics.

An affidavit made by the clerk of the Lewisham District Board of Works in support of the rule alleged that for a long time the guardians had failed, neglected, and refused to carry out the duty imposed upon them with regard to persons who had made default in complying with the Vaccination Acts, and that, although a great number of cases of default had been brought to the attention of the guardians, in no instance had they directed their officer to institute and conduct proceedings against such defaulters as required by law. Numerous instances were given in which, as was alleged, the guardians had refused to direct a prosecution.

Lord Coleridge, Q.C. (*Schultess Young* with him), for the guardians, shewed cause against the rule. The district board of works have no legal right or interest entitling them to apply for this mandamus. There is no case in which proceedings have been taken against guardians to compel them to perform

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their duty under the Vaccination Acts, except at the instance of the Local Government Board. [He was stopped.]

Macmorran, Q.C. (*A. H. Poyser* with him), for the district board of works, supported the rule. The district board of works are entitled to apply for a mandamus here. Their legal right and interest in the matter is to have the provisions of the Vaccination Acts carried out in the district. They have a number of statutory duties to perform in relation to infectious and epidemic diseases, and neglect to enforce the vaccination laws may lead to an outbreak of small-pox. The guardians have a statutory duty to enforce the Vaccination Acts, though they have no other sanitary powers. The Local Government Board have no greater right to a mandamus against the guardians than the district board of works have; yet in *Reg.* v. *Guardians of Keighley Union* (1) a mandamus was granted against guardians at the instance of the Local Government Board. The district board have no other remedy than by mandamus.

WRIGHT J. This is a case of great importance, but we feel able to decide it at once, and there is an appeal from our decision. Certainly, so long as I have had anything to do with applications for a mandamus I have always understood that the applicant, in order to entitle himself to a mandamus, must first of all shew that he has a legal specific right to ask for the interference of the Court. That rule is laid down in the text-books; it is stated in Tapping on Mandamus, pp. 27, 28, thus: "The prosecutor must be clothed with a clear legal and equitable right to something which is properly the subject of the writ, as a legal right by virtue of an Act of Parliament," and a number of cases are cited in support of that proposition—a proposition which I think it is necessary should be maintained. This Court would be far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its interference had a legal right to insist upon such performance. The case referred to by counsel for the prosecutors—*Reg.* v. *Guardians of Keighley Union* (1)—is not mentioned in any text-book.

(1) (1875) 39 J. P. 360; (1876) 40 J. P. 70.

There was no argument when the rule nisi was granted, and the Court does not seem to have been informed of this objection. When the return was made to the writ it was too late to raise some of the points which might have been raised on the argument of the rule. I am of opinion that the applicants in this case have no such specific legal right as entitles them to come to this Court for a mandamus.

There is another ground of objection to the application. The Vaccination Acts, 1871 and 1874, give the Local Government Board power to act in any case in which they think fit to exercise their statutory authority. They can make rules and regulations with respect to vaccination matters and enforce them against the guardians, and they have the same powers with respect to guardians and vaccination officers in matters relating to vaccination as they have with respect to guardians and officers of guardians in matters relating to the relief of the poor. On the second ground, I think that an application to this Court for a mandamus is not the appropriate legal remedy.

I am of opinion, therefore, that the rule ought to be discharged.

BRUCE J. I am of the same opinion. I regret to have to discharge this rule on technical grounds, but the practice is well established. This Court has never exercised a general power to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus should have a legal specific right to enforce the performance of those duties.

Rule discharged.

Solicitor for applicants: *W. W. Young.*
Solicitor for guardians: *Cuthbert Curtis.*

W. A.

C. A.

1897

Jan. 28;
Feb. 1;
March 1.

[IN THE COURT OF APPEAL.]

TATE *v.* LATHAM & SON.

Employers' Liability Act—Defect in Condition of Plant—Guard temporarily removed from Circular Saw—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1.

The plaintiff was employed at the defendants' saw-mills to assist one of their sawyers who was engaged at a circular saw. The defendants had provided the saw with a sufficient guard or fence under the bench for the prevention of accidents. The guard was moveable for the purpose of removing the sawdust which collected under the bench. The sawyer for his own purposes improperly removed the guard, and whilst the guard was off the plaintiff fell against the saw and was injured:—

Held, that the absence of the guard was a defect in the condition of the machinery within s. 1, sub-s. 1, of the Employers' Liability Act, 1880.

Willetts v. *Watt*, [1892] 2 Q. B. 92, distinguished.

APPEAL from the Shoreditch County Court.

The plaintiff, a lad of seventeen years of age, was employed at the defendants' saw-mills. His duty was to assist a sawyer, named Cook, who worked at one of the circular saws. The plaintiff commenced working at Cook's saw-bench in January, 1896. At that date and for three months afterwards the saw was not provided with any fence or guard under the bench. In April Cook told the plaintiff to make a guard for the saw, because the factory inspector was coming round, and the plaintiff accordingly made one. The guard was moveable, as it had to be taken off from time to time for the purpose of removing the sawdust which collected under the bench. On the afternoon of August 17 Cook removed the guard as it was in his way, and neglected to replace it. Cook was in charge of the bench, and it was his duty to put up the guard. On the following morning, soon after 8 A.M., the plaintiff, whilst helping another boy to clear away a plank, slipped under the bench, and, owing to the absence of the guard, his foot was cut off by the revolving saw.

The plaintiff brought an action under the Employers' Liability Act, 1880, alleging that the injury was caused by (inter alia) the

defective condition of the ways, works, machinery, and plant of the defendants. The county court judge ruled that, the defendants having furnished a complete machine, the temporary absence of the guard was not a defect in the condition of the machinery or plant within the meaning of s. 1 (1) of the Act, and he accordingly dismissed that part of the plaintiff's claim. (2) The plaintiff appealed.

Dodd, Q.C., and *W. Addington Willis*, for the plaintiff. The absence of the guard was a defect in the condition of the machine, for it rendered it dangerous when in motion: *Morgan* v. *Hutchings*. (3) If the whole arrangement of the machine as used gives rise to danger it is a defective machine, even though each part is in itself perfectly good: *Cripps* v. *Judge* (4); *Stanton* v. *Scrutton*. (5) The date at which the condition of the machine is to be looked at is the date of the accident. The owner of dangerous machinery is not only bound to provide proper fencing, but is also bound to see that the fencing is used: per Byles J., *Clarke* v. *Holmes*. (6) The other side will rely on *Willetts* v. *Watt* (7), where the temporary removal of the lid of a catchpit in the floor of a workshop, whereby the plaintiff fell into the catchpit and was injured, was held not to be a "defect" in the floor. But the distinction between that case and the

(1) By s. 1 of the Employers' Liability Act, 1880, "Where . . . . personal injury is caused to a workman

"(1.) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer," the workman is to have the same remedy against the employer as if he had not been in his service.

By s. 2, "A workman shall not be entitled under this Act to any . . . . remedy against the employer . . . ."

"(1.) Under sub-s. 1 of s. 1, unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

(2) The plaintiff also claimed under other sub-sections of s. 1, but it is not necessary for the purposes of this report to state the facts with regard to those sub-sections. The Court of Appeal ordered a new trial of the case generally.

(3) (1890) 6 Times L. R. 219.

(4) (1884) 13 Q. B. D. 583.

(5) (1893) 62 L. J. (Q.B.) 405.

(6) (1862) 7 H. & N. 937, at p. 947.

(7) [1892] 2 Q. B. 92.

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present is that there the removal of the lid was in the course of the ordinary and proper use of the factory, it being necessary to remove it in order to get access to a cylinder, whereas here the removal of the guard was unnecessary and improper.

Jelf, Q.C., and *Lynn*, for the defendants. The question is concluded by the decision of the Court of Appeal in *Willetts* v. *Watt*. (1)

[WRIGHT J. There the negligence consisted, not in removing the lid, but in omitting to give warning when it was off. Here the guard was improperly removed.]

That can make no difference. When once the lid or guard, as the case may be, is removed, the result must be practically the same whether the removal was proper or improper. As pointed out by Fry L.J. in *Willetts* v. *Watt* (2), the defect aimed at by s. 1, sub-s. 1, is a defect of "a chronic character," for that sub-section must be read along with s. 2, sub-s. 1, which shews that the defect must be of a kind which by due care upon the part of the employer or his overseer may be discovered and remedied. Here the temporary removal of the saw-guard is not of such a kind. Had the guard supplied been of such an inconvenient description that there was an a priori likelihood of the workman removing it, that would have been another matter; but there was no evidence of that. No doubt the owner of dangerous machinery is bound to take reasonable care to see that the fencing of the machinery is not removed. But the fact that a workman removes a guard from a saw when the employer, or the person entrusted by him to see that the machinery is in proper condition, is not looking, is no evidence of want of due care.

Dodd, Q.C., in reply.

Cur. adv. vult.

Feb. 1. WRIGHT J. On this appeal the question is whether there was a defect in the condition of the saw-bench which formed part of the defendants' machinery or plant. The plaintiff was a lad who was employed at one end of the bench in question under the orders of a sawyer named Cook who

(1) [1892] 2 Q. B. 92. (2) [1892] 2 Q. B. 92, at p. 100.

stood at the other end. It was necessary that the bench should be fenced in order to prevent accidents, and a guard had been provided for that purpose. It was Cook's duty to see that the guard was kept in its place. He neglected that duty, and removed the guard, not in the ordinary course of occasional necessity, but because it was in his way. Then as the result of the absence of that guard the plaintiff suffered the injury of which he now complains. The question is whether the absence of the guard was under the circumstances a "defect in the condition of the machinery or plant." If no guard at all had been provided it seems clear that its absence would have been a defect. Again, if the guard, although provided, had never been put in its place, it is equally clear that that omission would have constituted a defect. In the present case the guard was unnecessarily and for some time out of place. In my judgment, no distinction can be drawn between a case in which the guard was never fixed in position and one in which it was sometimes not fixed. When it was left out of its proper place its absence was as much a defect as if it had never been provided at all. The only difficulty I have felt has been owing to the case of *Willetts* v. *Watt*. (1) But I think that that case is distinguishable. There the lid of the catchpit was properly removed in the course of the ordinary and proper conduct of the business. The negligence there complained of was negligence, not in removing the lid, but in omitting to give warning of the danger when it was removed. For the defendants reliance has been placed on an expression in the judgment of Fry L.J. in that case that the defects contemplated by the section must be "chronic" defects; but it is to be observed that in the report in the *Law Journal* (2) he is represented as having used the milder expression "somewhat chronic." I think that there was enough here to satisfy the latter description. The appeal must be allowed.

BRUCE J. read the following judgment:—The question we have to determine is whether there was evidence before the

(1) [1892] 2 Q. B. 92. (2) (1892) 61 L. J. (Q.B.) 540, at p. 545.

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judge that the injury to the plaintiff was caused by reason of any defect in the condition of the machinery or plant used in the business of the defendants. I think there was. "Defect" means a lack or absence of something essential to completeness. In the present case the machinery or plant in question was a bench or table supporting a circular saw. The saw revolved in a slit in the bench, part of the disc of the saw being above the table and part below. It seems to be clear that it was necessary to the completeness of the machinery or plant to have a plank or shutter fitted to the side of the table as a screen or fence to protect persons working near the saw-bench from the part of the saw which was under the bench. The bench was fitted with such a shutter, and when the shutter was in its place the bench was complete. It was necessary from time to time to remove the shutter for the purpose of taking away the sawdust from under the bench. At the time when the accident happened the shutter was not in its place. It had not been removed for the purpose of removing sawdust, and there appeared to be no good reason why it should not be in its place. By reason of its absence, the plaintiff having slipped or fallen, his leg came into contact with the revolving saw and was injured. It was argued with great force by Mr. Jelf that there was no defect in the machinery or plant because the bench was fitted with all the proper appliances, and had about it everything necessary to make it complete, and he contended that if there was negligence in not putting the shutter into its proper place that did not constitute a defect in the machinery or plant. But I am unable to accede to this argument, because the words of the Act of Parliament relate to the "condition" of the machinery or plant. A machine may be in its nature and character a perfect machine and may yet be in an imperfect and defective condition. The condition of the plant or machinery means, I think, the state of the plant or machinery at the time of the injury. When the shutter was out of its place the condition of the machine was as defective as if it had not been provided with a shutter. If the shutter had been out of its place for a month or for six months, can it be doubted that

during that period the saw-bench would have been without an appliance necessary to its completeness—in other words, would have been in a defective condition? And if there was a defect in its condition at the time of the accident it seems to me to be immaterial to consider (apart from the question of negligence) how long the defect had existed. Of course the action cannot be maintained without proof of negligence under s. 2, sub-s. 1. But that matter is not now raised before us. The learned judge having ruled that there was no evidence of a defect, it became unnecessary to consider whether what was alleged to be a defect arose from such negligence as is mentioned in the sub-section to which I have referred. The only doubt that has arisen in my mind has been occasioned by the decision in the case of *Willetts* v. *Watt*. (1) Of course the decision in that case is an authority binding on us; but after careful consideration I have come to the conclusion that it does not apply to the present case. The Court of Appeal in that case held that there was not in the circumstances a defect in the condition of the way. The way was of a peculiar character. It was a way across the floor of a workshop in which there was a catchpit usually covered with a lid. It was necessary to have the catchpit open at times, and it was not possible to have had it fenced at the times when it was so open. The Court of Appeal were of opinion that, although there might have been an action for negligence in not giving proper warning of the condition of the way, there was no evidence of a defect in its condition. It was suggested in argument that the point decided in *Willetts* v. *Watt* (1) was that the defect must be of a chronic character. There is no doubt an expression in the judgment of Fry L.J. which supports that view, but even that expression is modified in the report of the case in the *Law Journal* (2), and I do not think that the decision of the Court proceeded upon any such ground. Of course, any dictum of Fry L.J. is entitled to be treated with the greatest respect; but I think we should be taking too narrow a view of the decision in *Willetts* v. *Watt* (1) if we were to hold that it proceeded upon a dictum to be found only in the judgment of one of the

(1) [1892] 2 Q. B. 92. (2) 61 L. J. (Q.B.) 540, at p. 545.

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judges, and which, as it seems to me, was not necessary to support the conclusion at which the Court arrived.

Appeal allowed. Order for new trial.

J. F. C.

The defendants appealed.

March 1. *Jelf, Q.C.*, and *Lynn*, for the defendants. There was no evidence in this case of any defect in the condition of the machine for which the defendants were responsible. The machine was provided by the defendants with the necessary appliance for the protection of those working near it. It was merely the negligence of Cook, the plaintiff's fellow-workman, in not replacing the guard, and not any defect in the apparatus provided by the defendants, which caused the accident. The scope of the Employers' Liability Act, 1880, is only to do away with the defence of common employment in certain specified classes of cases where there may be said to be default on the part of the employer himself or of a superior servant, who may be considered for this purpose to represent, or, as it has been sometimes expressed, to be the alter ego of the employer. Where a machine is provided by the employer with all the appliances necessary for efficiency and safety, the fact that a fellow-workman of the plaintiff negligently omits to replace a part of the machine which has been temporarily removed does not constitute a defect in the machine within the meaning of the Act: *Willetts* v. *Watt*. (1)

[LORD ESHER M.R. In that case it would appear that the lid of the catchpit was properly removed.]

There must be some defect in the machinery provided itself, apart from the mode of user, to bring the case within s. 1, sub-s. 1, of the Employers' Liability Act, 1880. If there be no defect in the machine, the employer cannot be liable; but, by s. 2, sub-s. 1, even if there be a defect, to render him liable it must have arisen or not been discovered or remedied through the negligence of himself or of some person in his service entrusted by him with the duty of seeing that the machine is

(1) [1892] 2 Q. B. 92.

in proper condition. There is no evidence to shew that Cook was such a person. He was no doubt in charge and had control of the machine in the sense that it was his duty to work at it; but the person contemplated by the Act is a person entrusted by the employer with some general superintendence of ways, works, machinery, or plant.

Dodd, Q.C., and *W. Addington Willis*, for the plaintiff, were not called upon.

LORD ESHER M.R. In this case I agree with the decision of the Divisional Court that there must be a new trial. The question is whether the county court judge was right in holding, without referring the matter to the jury, that there was no defect in the condition of the machine in question, which was a saw-bench. It appears to have been necessary, for the purpose of protecting persons near the machine from being injured by the saw while in motion, that a guard should be fitted at the side of it. A guard had been provided for that purpose, which was moveable when it became necessary to remove the sawdust which in the course of working collected under the bench. It seems to me clear that, if the machine were left without that guard, whilst in motion, it might at that time be said to be in a defective condition. But, in order to make the employer liable, the defect must have arisen from, or have not been discovered or remedied owing to, the negligence of the employer or of some person in the service of the employer and entrusted by him with the duty of seeing that the machinery was in proper condition. In this case it cannot be said that the employers themselves had any opportunity of knowing that the machine was in a defective condition on the day in question. If the machine was in a defective condition, Cook was the person who would know of that. The question therefore arises whether there was evidence that Cook was a person entrusted by the defendants with the duty of seeing that the machinery was in proper condition. I think there was. There was evidence that he acted as a person entrusted with that duty, for the evidence was that he told the plaintiff to make a guard for the machine, because the factory inspector was coming round.

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He therefore acted as if it was his duty to see that the machine had a proper guard, and he was not called by the defendants. It seems to me that there was evidence on which the jury might find that Cook was a person entrusted by the defendants with the duty of seeing that the machinery was in proper condition. The argument for the defendants was that the machine could not be said to be in a defective condition, because a guard had been provided. But I do not think that the machine could rightly be said to be in a proper condition, merely because there was a guard provided which could be fitted to it, if that guard was not so fitted whilst it was in motion. The evidence was that, Cook being the person whose duty it was to put the guard on, he had left it off for some considerable time. It was proved that on the previous day he had removed it, because it was in his way, and that on the day in question it was not replaced. Upon the facts as proved at the trial there seems to me to have been evidence for the jury that the machine was in a defective condition, and that the defect arose from the negligence of a person entrusted by the defendants with the duty of seeing that the machinery was in proper condition. I think therefore that the judgment of the Divisional Court was right, and this appeal must be dismissed.

CHITTY L.J. I agree that there must be a new trial. I think there was evidence for the jury of a defect in the condition of the machine on the day when the accident happened. Sawing-machines of this description are among the most dangerous instruments used in factories. Some months before the accident, when the factory inspector was about to come round, Cook appears to have perceived that this machine was defective by reason of having no guard, and he ordered the plaintiff to make a shutter for the purpose of protecting any one from injury through the saw's being left unfenced while in motion. This shutter was moveable, but it clearly ought to have been in its place, except when it was necessary to remove the sawdust, at which time the saw would not be in motion. Inasmuch as the shutter was not in its place from the time when work commenced at this machine on the day in question,

I think there was evidence for the jury that the machine was in a defective condition. On the other point which is closely connected with this, I think there was evidence for the jury that Cook was a person entrusted by the defendants with the duty of seeing that the machinery was in proper condition and that the defect arose from his negligence.

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Appeal dismissed.

Solicitors for plaintiff: *Lindus & Bicknell.*
Solicitors for defendants: *Watson, Sons & Room.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1897 *Jan.* 25.

DEAN AND CHAPTER OF ST. ASAPH, APPELLANTS: OVERSEERS OF LLANRHAIADR-YN-MOCHNANT AND ASSESSMENT COMMITTEE OF LLANFYLLIN UNION, RESPONDENTS.

Poor-rate—Rateable Value—Tithe Rent-charge—Deductions—Tenants' Profits—Liability to Repair Chancel of Parish Church.

In an assessment to the poor-rate of the owners of a rectorial tithe rent-charge no deduction is permissible in respect of tenants' profits, unless it is established as a fact that such deduction would be required to induce a tenant to take a demise of the rent-charge from year to year; and no deduction is permissible in respect of the liability of the owners of the rent-charge to repair the chancel of the parish church.

APPEAL from a judgment of a Divisional Court on a case stated by quarter sessions on an appeal against a poor-rate.

The respondents, the assessment committee of the Llanfyllin Union, assessed the appellants to the poor-rate in respect of the rectorial tithe rent-charge of the parish of Llanrhaiadr-yn-Mochnant; and the respondents, the overseers of the parish, made a rate upon the appellants in respect of such assessment.

The appellants, being dissatisfied with the deductions allowed by the assessment committee in arriving at the rateable value, appealed to quarter sessions. The Court of Quarter Sessions allowed a deduction for, inter alia, (1.) remuneration of collector:

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(2.) legal costs and out of pocket expenses; (3.) bad debts and irregularity in payments, and (4.) tenants' taxes; and ordered that the amount of the deduction in respect of these four matters should be 4 per cent. of the gross estimated rental. They held that a further deduction should be made for tenants' profits, and that the amount of this deduction should be 1 per cent. of the gross estimated rental. They also held that a deduction should be made in respect of the liability of the appellants, as owners of the rectorial tithe rent-charge of the parish, to repair the chancel of the parish church, and that the amount of such deduction should be 1 per cent. of the gross estimated rental. They allowed the appeal, and ordered that the rate should be amended, but stated a case for the opinion of the Court on the questions—(1.) whether a deduction should be made in respect of tenants' profits in addition to the deduction for collection; (2.) whether a deduction should be made in respect of the liability of the appellants to repair the chancel of the parish church.

The respondents accordingly appealed to the Divisional Court on the special case.

The Court (Wills and Wright JJ.) held that neither of the deductions should be allowed. As to the tenants' profits, they held that the case was governed by *Mersey Docks* v. *Liverpool* (1); and as to the repair of the chancel, that this was not an ecclesiastical due chargeable on the profits of the rectory, as in the matters dealt with in *Rex* v. *Joddrell* (2), but a liability on the rector; and that as it was contrary to the general principles of rating to look at what is done with profits after their receipt, the deduction ought not to be made. The appeal was therefore allowed. The appellants appealed.

Macmorran, Q.C., and *Stevenson Moore*, for the appellants. The quarter sessions were right in allowing the deductions. As to tenants' profits, in *Hackney and Lamberhurst Tithe Commutation Rent Charges* (3) it is pointed out that in the case of tithes a deduction for tenant's profits is not necessarily

(1) (1873) L. R. 9 Q. B. 84.
(2) (1830) 1 B. &. Ad. 403.
(3) (1858) E. B. & E. 1; sub-nom. *Reg.* v. *Goodchild*, 27 L. J. (M.C.) 233.

to be made, but that it is allowable if the deduction for collection would leave no profit in the hands of the hypothetical tenant. Whether it does so is a question of fact in every case, which the quarter sessions, by allowing the item of tenant's profits, have found in favour of the appellants. The decision of the justices in quarter sessions was not given on the ground that such a deduction should be made as an absolute right in all cases, but that it is reasonable in this case. *Mersey Docks* v. *Liverpool* (1) does not, as the Divisional Court seem to have thought, overrule the former case.

As to the repairs of the chancel, the deduction is in respect of the average cost, as in other cases of rateable hereditaments. The only method of enforcing the repairs is by sequestration of the tithes, so that the cost is a direct charge on the tithes. There is no personal liability to repair, and no instance of an action to enforce such liability. In Archbold's Poor Law, 14th ed. p. 837, the circular of the Poor Law Board of May 9, 1859, is set out, in which it is stated that this deduction should be made, and this view has been uniformly acted on.

Marshall, Q.C. (*Ellis J. Griffiths* with him), for the respondents. The case does not shew that the charge for collection is insufficient: and what the quarter sessions have done is to make a deduction in respect of tenant's profits, as a matter of right, and not as a reasonable thing in the particular case. This case is concluded, as decided by the Divisional Court, by *Mersey Docks* v. *Liverpool* (1), in which Blackburn J. (2) mentions the case of tithes as one in which no allowance would be made for tenant's profits, but a reasonable remuneration for the expense and trouble of collecting. In point of fact, all the tithes are devoted by statute to the sustentation of the cathedral of St. Asaph and the maintenance of the choir; but even if this were not so, there is no authority to shew that the maintenance of the chancel of the church of the parish out of which the tithes issue can be charged on them.

LORD ESHER M.R. The rules as to discovery of the hypothetical tenant and how he is to be dealt with are perfectly

(1) L. R. 9 Q. B. 84. (2) L. R. 9 Q. B. at p. 92.

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well settled, and there is no case to be overruled. The cases of *Hackney and Lamberton Tithe Commutation Rent Charges* (1) and *Mersey Docks* v. *Liverpool* (2) are left wholly untouched, and we have to come to this case and the facts of this case. We have to find out what in this case the hypothetical tenant would give; and in order to do that we must act upon the ordinary rules.

The point raised is whether certain deductions which are named ought to be made. The Court found that a deduction should be made for the remuneration of the collector, for legal costs and out of pocket expenses, bad debts and irregularities in payments, and tenant's taxes. That is quite right; but it is said that a further deduction should be made for tenant's profits. In my opinion the Court of Quarter Sessions have made a mistake in point of law. There is no evidence, and there is no fact alleged in the case, upon which they can make this further deduction. They were persuaded that as a matter of law they ought to allow it; but there is nothing to support that view, and it was a mistake in law to have allowed it.

With regard to the repair of the chancel, the hypothetical tenant has nothing to do with the chancel of the church. He never could be charged with the cost of repairing it; and, therefore, here again the justices have made a mistake in law in allowing something in respect of which there is no legal ground or ground in fact for making the deduction. I think the Divisional Court were right in reversing the decision of the justices, and this appeal must be dismissed.

LOPES L.J. The first thing we have to consider is upon what principle are tithes to be assessed to the poor law. The principle of such assessments is that tithe rent-charge is to be assessed, like all other property, according to the amount at which it might reasonably be expected to let to a tenant from year to year, and that beyond allowances for expenses of collection, law expenses, and bad debts no allowance should be necessarily made, though I can imagine cases where the deduc-

(1) E. B. & E. 1; sub nom. *Reg.* v. *Goodchild*, 27 L. J. (M.C.) 233.
(2) L. R. 9 Q. B. 84.

tion in respect of tenant's profits might be made. That would only be in a case where it was proved and found as a fact by the sessions that the amount of the deduction in respect of remuneration to the collector, and in respect of other expenses, was insufficient, and that anything allowed in respect of tenant's profits was allowed in addition, because the deduction was insufficient. There is nothing of that kind in this case. The Court here made certain proper deductions; but they also held that a further deduction should be made for tenant's profits. In my opinion, that is wrong. I think they mistook the effect of the authorities. The justices appear to have thought, that in addition to the remuneration of the collector, however sufficient that might be, they ought to further allow something in respect of tenant's profits; and, if so, they were wrong. I am perfectly clear that they have not found as a fact that the amount allowed for collection was insufficient, and that something in addition should be allowed for tenant's profits on that ground. I think, therefore, that the deduction that is asked for in respect of tenant's profits should not have been allowed. Then it is said that there ought to be a deduction for the cost of the repairs of the chancel. I must say I have very great difficulty in understanding that contention. They are distinct and separate hereditaments. The hypothetical tenant with whom we have to deal is not the hypothetical tenant of the chancel; and in my opinion it is impossible to say that any deduction ought to be made in respect of those repairs. There is no authority to the effect that any such deduction has ever been allowed, nor do I think that there is authority to shew that the point has ever been raised or contested. I have come to the conclusion that there ought to be no deduction made either in respect of tenant's profits or in respect of repairs of the chancel, and that the judgment of the Court below should be affirmed.

CHITTY L.J. In regard to the first point, both the authorities that have been cited at the Bar stand unaffected. The *Hackney Tithes Case* (1) states very clearly the principle which

(1) E. B. & E. 1; sub nom. *Reg.* v. *Goodchild*, 27 L. J. (M.C.) 233.

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ST. ASAPH (DEAN AND CHAPTER) v. LLANRHAIADR-YN-MOCHNANT (OVERSEERS).

Chitty L.J.

is always acted upon. The rent-charge is to be assessed, like all other property, according to what it might be reasonably expected to let at from year to year. Now, if the Court of Quarter Sessions had found that the deductions mentioned, as to the propriety of which there is no dispute, were insufficient, and that the tenant would reasonably require some further allowance, the case would have stood differently. So, also, if they had held that the deduction in respect of tenant's profits was one which, as a matter of fact, it would be reasonable to allow in the case; but, as I read the case, there is no such finding.

In regard to the chancel, I cannot see that the hypothetical tenant can reasonably ask for a deduction from his rent on the ground of any obligation to repair the chancel. It would not be incumbent upon him to do any repairs to the chancel. They are separate subject-matters altogether; and I agree that the appeal fails on this point also.

Appeal dismissed.

Solicitor for appellants: *E. W. I. Peterson.*

Solicitors for respondents: *Robbins, Billing & Co., for Pughe & Jones, Llanfyllin.*

A. M.

FINLAY *v.* THE MEXICAN INVESTMENT CORPORATION.

1896
Nov. 8, 23.

Insurance—Securities—Contract to Insure Payment of Debenture at Maturity —Postponement of Date of Maturity by Special Resolution of Debenture-holders—Liability of Insurer.

The plaintiff, the holder of a debenture in a company which matured for payment on November 4, 1895, effected a policy of insurance with the defendants which, after reciting that the debenture matured on that day and that the plaintiff had paid a premium for insurance until that date, guaranteed to the plaintiff the due payment of the principal money secured by the debenture, if the debtors should make default for more than three calendar months in payment of any principal money due "under the debenture." Subsequently, by a special resolution of the debenture-holders, which was neither assented to nor dissented from by the plaintiff, the date for payment of the debentures of the company was postponed. The plaintiff's debenture was not paid off on November 4, 1895, nor in three calendar months after that date:—

Held, that, assuming the special resolution to be valid, the contract was nevertheless one of insurance against the default of the company to pay the amount of the debenture on the original date; that there had been a default by the company to pay money due under the debenture within the meaning of the policy; and that the plaintiff was therefore entitled to recover the amount of the policy from the defendants, who were entitled on payment to be subrogated to the plaintiff's rights as modified by the special resolution.

Action tried before Charles J. without a jury.

The following statement of facts is taken from the written judgment of the learned judge.

The plaintiff in this case sought to recover from the defendants, an insurance company, the sum of 500*l.* under a policy effected with them dated October 14, 1891. He was then the holder of a mortgage debenture issued by the Capitol Freehold Land and Investment Company, whereby that company contracted to pay him 500*l.* on November 4, 1895, or on such earlier day as the principal moneys thereby secured should become payable in accordance with the conditions indorsed thereon. The debenture was issued subject to the indorsed conditions, by the tenth of which the debenture-holder was

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subject to the provisions of an indenture dated February 24, 1886, to which reference will presently be fully made. The policy whereby the plaintiff insured his debenture with the defendants, after reciting that the plaintiff was the holder of 500*l.* of the debentures of the Capitol Company bearing interest at the rate of 5*l.* per cent. per annum, "which debenture matured on November 4, 1895," and that he desired to be insured by the defendants in the manner therein appearing, and had paid a premium of 5*l.* for such insurance until November 4, 1895, witnessed as follows: "The corporation do hereby guarantee to the assured the due payment of the principal moneys and interest secured by the debentures in manner following, that is to say, (1.) If the debtors make default for more than sixty days in the payment of any interest due under the debentures, the corporation will pay the amount thereof to the assured at the expiration of fourteen days after the assured shall have demanded payment thereof from the corporation; (2.) If the debtors make default for more than three calendar months in payment of any principal money due under the debentures the corporation will pay the same principal moneys to the assured at the expiration of three calendar months after the assured shall have demanded payment thereof from the corporation; (3.) This policy is issued subject to the conditions indorsed hereon which are to be deemed part of it." One of the conditions was that "the assured must not without the consent of the corporation assent to any arrangements modifying the rights or remedies of the assured under the debentures."

The debentures of the Capitol Company were issued sometimes singly and sometimes in batches at various dates between March 5, 1886, and December 2, 1892. Many of them were repayable in ten years, whilst others were repayable in five or seven years. In December, 1892, a number of the debentures were maturing, but the company was not in a position to meet them. The directors under these circumstances resolved to ask the debenture-holders to consent to a modification of their rights, and for that purpose the trustees for the debenture-holders summoned a meeting at the request of the directors on

January 10, 1893; this was done under the provisions of the deed dated February 24, 1886, already referred to. That deed, which was entered into for the purpose of securing the debentures, provided (by clause 15, amongst other things, for the creation of a sinking fund for the redemption of the debentures, but so as that in every case overdue debentures should be redeemed before debentures not overdue, and those maturing at an earlier date before those maturing at a later date, but as between debentures maturing at the same date, then by a drawing in the manner therein prescribed. The fourth schedule, which took effect as a part of the deed, gave to a general meeting of debenture-holders duly summoned the following power, exercisable by special resolution—namely, "a power to sanction any modification or compromise of the rights of the debenture-holders against the company or against its property, whether such rights shall arise under the debentures or under these presents or otherwise, provided such modification or compromise is approved in writing by the trustees." The meeting was duly held, and the prescribed majority of three-fourths passed a special resolution of which the second and third clauses are alone material. The second clause provided that, "subject to the provisions of clause 15 of the trust deed of February 24, 1886, relative to the order in which debentures are to be redeemed, the outstanding debentures shall be redeemed, but without premium, as follows: in 1898 and 1899, 2½ per cent. of the whole; in 1900 and 1901, 5 per cent.; 1902 and 1903, 7½ per cent.; in 1904 and 1905, 10 per cent.; and in 1906 and 1907, 25 per cent. The drawings, as prescribed by clause 15, to be made on May 1 in each year." Provision was also made for an increase of the sinking fund. The third clause provided that "No debenture due according to its tenor at the date of this resolution, or becoming due before December 31, 1907, is to be payable unless and until it be drawn for redemption, provided that the company is to be at liberty in any year to increase the percentage of the debentures to be drawn in that year, or to redeem by drawings any debentures prior to the year 1898." These resolutions were afterwards embodied in a supplemental trust deed, which recited that previously to the

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holding of the meeting a considerable number of the debentures had become due, and the company was unable to pay them. The plaintiff, who had been duly informed that the meeting would be held, communicated with the defendants; but they declined to interfere, and he accordingly did nothing.

The plaintiff, shortly after November 4, 1895, demanded payment from the defendants of the amount of the policy; but the latter refused to pay, on the ground that the 500*l.* was not due under the debenture on that date. The plaintiff thereupon brought this action.

Channell, Q.C., and *Montague Lush*, for the plaintiff. On the face of the policy it is apparent that it was intended to guarantee the payment of the amount of the debentures by the Capitol Company on a fixed day, November 4, 1895. This is clear from the fact that the insurance itself expired on that day, and the policy would be useless to the plaintiff if it did not guarantee him against the default of the Capitol Company to pay on that day or within three months afterwards the principal money due under the debenture. The 500*l.* was money "due under the debenture" within the meaning of the condition in the policy, and, notwithstanding the postponement of the date of payment under the special resolution, there was a default in payment on November 4 of the principal money due under the debenture within the meaning of the policy. Secondly, the special resolution was ultra vires, being beyond the authority conferred on the debenture-holders by the deed of February 24, 1886; it did not preserve the priority of date among the various classes of debenture-holders, and was not equally for the benefit of the whole body.

Joseph Walton, Q.C., and *Hollams*, for the defendants. There was no default in payment on February 4 of money due under the debenture, for the date of payment had been postponed by the special resolution, which was binding upon the plaintiff. The debenture-holders had power to postpone the date under the deed of February 24, 1886, which regulated their rights. The special resolution was not ultra vires, for if properly interpreted it does not affect the priorities and rights

of the various classes of debenture-holders inter se, but merely operates to postpone the due date of all the debentures.

Channell, Q.C., in reply.

Cur. adv. vult.

Nov. 23. The following written judgment was delivered by

CHARLES J. [After stating the facts as above, the learned judge proceeded:—] It will be remembered that by a condition indorsed on his policy the plaintiff was bound not to assent to any arrangement modifying his rights without the defendants' consent.

It will be seen that the effect of the resolutions on the plaintiff's rights was to postpone the payment of his debenture to a date not earlier than 1898; and it was contended by the defendants that under these circumstances there had been no default within the meaning of the policy. The defendants were liable to pay only if the Capitol Company made default in payment of moneys due "under the debentures," and here, by a special resolution binding on all debenture-holders, payment of all debentures was postponed until a time not yet arrived. The plaintiff's debenture, although it named November 4, 1895, as the day of maturity, was subject to the conditions indorsed, and by the tenth condition was subject to the provisions of the indenture of February 24, 1886, and therefore, as regards him, the day for payment was put off, and the company had been guilty of no default.

To this argument the plaintiff made two answers. First, he said that the policy guaranteed payment of the principal on a fixed day, and that there was default if payment was not made on that day. Payment "under the debenture" meant payment on the day named in the recital in the policy, namely, November 4, 1895, and there has been default on that day. Indeed, there had been a default from December, 1892, when the Capitol Company had announced their inability to pay the debentures then maturing. The defendants, no doubt, would be entitled to the benefit of the modified right of the plaintiff under the special resolution, assuming it to be valid; but their liability under the policy was untouched by the modifying resolution.

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The policy was only to continue until November 4, 1895; and if this contention were to prevail, the policy would be wholly nugatory.

Secondly, the plaintiff submitted that the special resolution was beyond the scope of the authority conferred upon the general body of debenture-holders by the deed of February 24, 1886; in other words, that the "modification" determined upon was not, as it ought to have been, for the common and equal benefit of all the debenture-holders, but created an inequality amongst them; and it was not disputed that if the true effect of the resolution was to benefit one set of debenture-holders at the expense of another it was ultra vires.

With regard to the first point, in my opinion the plaintiff's contention is well founded. The contract appears to me to be really one of insurance against a particular event, namely, the default by the Capitol Company to pay the plaintiff the amount of his debenture on November 4, 1895. That event has happened, and the defendants must therefore pay, and cannot rely upon the terms of the special resolution postponing the date of payment as exonerating them from liability. The contract, however, being one of indemnity, they are entitled upon payment to be subrogated to the plaintiff's rights as modified by the special resolution, if it be valid. It is indeed they, and not the plaintiff, who are to assent to or dissent from the proposed modifications. They have reserved that right to themselves by the condition indorsed on the policy, to which I have already referred, forbidding the plaintiff from acting without their consent. I may add that, although not an authority upon the question involved in this case, my judgment is, I think, in accordance with the principles laid down by the Master of the Rolls in *Dane* v. *Mortgage Insurance Corporation*. (1)

In this view it becomes unnecessary to decide the question secondly raised as to the validity of the modifications; but I think I ought to express my opinion upon it. The difficulty is caused by the third clause of the resolution, which does not preserve the priority of date among the debentures, and under its terms the later debentures might be drawn and paid before

(1) [1894] 1 Q. B. 54.

the earlier; and if this clause stood alone I think there would be great force in the plaintiff's objection. But it should be read, it seems to me, in conjunction with the second clause, which is expressly made subject to clause 15 of the deed which preserves the priority of date; and the effect of the two clauses is, I think, that all debenture-holders shall be postponed until 1898; in other words, for five years or thereabouts from the passing of the special resolution no debenture is to be redeemed, and then drawings are to be recommenced, and the debentures paid off according to their dates. As a matter of charge, all debentures rank pari passu without any priority by reason of date (see clause 17 of the deed); but with regard to drawing, the dates are by the original deed to be regarded, and, by the modified scheme, taken as a whole, the privilege given by priority of date appears to me to be preserved. I cannot see how an agreement to postpone all payments for a limited term, and then to go on paying according to the same rules as before, ought to be held invalid as creating an inequality among the debenture-holders. It is said indeed that, inasmuch as clause 3 provides that no debenture is to be payable until "drawn" for redemption, the plaintiff will only be paid at some uncertain time at which his debenture may be drawn. But although the word "drawing" is used, it is, when clause 15 of the trust deed and clause 2 of the resolution are examined, obviously an inappropriate term to use concerning a debenture issued singly which is to be redeemed in order of its date, as provided by the earlier words of clause 15. A "drawing" properly so called can only take place among several debentures of even date. This conclusion is consistent with the judgment of Day J. in *Tod* v. *New Zealand Agricultural Co.* (1), with a note of which I was supplied. There, however, there was not only a clause similar to clause 3, but also power by special resolution "to accept any other property or securities instead of the debentures, and in particular any debentures or debenture stock of the company": and Day J. thought that the major power included the minor, and that if the resolution could provide, as it lawfully might, that the debenture-holders should never be paid off at all, it

(1) Unreported.

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certainly could provide that for a definite period for the common good the due dates of the debentures should be suspended, although in some cases the postponement might be for a longer period than in others. In that case, it may be observed, there was no clause similar to clause 2 in the present case, and the learned judge bases his decision mainly upon the provision as to the power to take debenture stock for debentures. The decision, therefore, cannot be regarded as an authority for the defendants here, where the deed contained no such power as that on which he so strongly relied. I base my decision in their favour upon this point, as I have said, on clause 2, which must, in my judgment, be read with clause 3. The observations of the learned judge in the case referred to on the power of the general body of debenture-holders to alter the due dates of debentures for the common good must be taken in conjunction with the other facts to which I have just alluded. They are far-reaching, but would not warrant me in holding that clause 3, standing alone, would be within the powers of the prescribed majority. This, however, is a matter on which I need pronounce no opinion.

In the result, for the reasons given with regard to the first question raised, my judgment must be for the plaintiff with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Lindo & Co.*

Solicitors for defendants: *Hollams, Son, Coward & Hawksley.*

W. J. B.

BRETT *v.* ROGERS.

1897
Jan. 21, 29.

Landlord and Tenant—Lease—Covenant by Lessee to pay "all Taxes, Rates, Duties, Assessments, and Impositions"—Notice by Sanitary Authority to Lessor to abate Nuisance by making new Drain—Expenses incurred in complying with Notice—Liability of Lessee—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76).

The defendant, who was the lessee of the plaintiff, covenanted to "pay the land tax, sewers rate, and all other taxes, rates, duties, assessments, and impositions, parliamentary, parochial, or otherwise, which now are or shall at any time during this demise be assessed or imposed on or in respect of the said demised premises." Very shortly after the commencement of the lease the sanitary authority served a notice on the plaintiff, as owner, under the Public Health (London) Act, 1891, directing him to abate a nuisance on the premises, and for that purpose to take up a defective drain and lay a new drain throughout the premises. The plaintiff incurred expenses in complying with the notice, and sued the defendant to recover the amount:—

Held, that the obligation to lay the new drain was a "duty imposed in respect of the premises," and that the defendant was liable to pay to the plaintiff the amount expended by her in complying with the notice of the sanitary authority.

Appeal from the judge of the Bloomsbury County Court.

The defendant was tenant to the plaintiff of a house, No. 58, York Terrace, Regent's Park, under a lease for twenty-five years dated April 24, 1896. By the reddendum the rent was to be paid "clear from land tax, sewer rate, and all other taxes, rates, assessments, or impositions whatsoever, parliamentary, parochial, or otherwise, now or hereafter during the said term rated, charged, or imposed on the said premises." The lease contained a covenant on the part of the lessee to pay the rent without any deduction or abatement whatsoever, "and to pay the land tax, sewers rate, and all other taxes, rates, duties, assessments, and impositions, parliamentary, parochial, or otherwise, which now are or shall at any time during this demise be assessed or imposed on or in respect of the said demised premises or of the rent hereby reserved (landlord's property tax only excepted)." The lease also contained a covenant to repair.

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By a notice under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), dated June 5, 1896, and directed to the owner of 58, York Terrace, the vestry of St. Marylebone, after stating that they were satisfied of the existence at 58, York Terrace, of a nuisance by reason of the drains being in a state so as to be a nuisance or injurious or dangerous to health, required the owner within twenty-eight days from service of the notice to abate the nuisance, and for that purpose to take up the defective drain and lay a proper pipe drain throughout the premises from the sewer in accordance with the vestry's regulations and ventilate the soil-pipe. The plaintiff did the work required at a cost of 43*l.* 18*s.*, and brought an action against the defendant in the county court to recover the amount. The particulars of claim, as originally framed, alleged a breach by the defendant of her covenant to repair, but by leave of the judge at the trial the particulars were amended by substituting a claim on the covenant to pay rates, taxes, &c. The learned judge gave judgment for the plaintiff, and the defendant appealed.

Archibald Brown, for the defendant. The learned county court judge was wrong. By the Public Health (London) Act, 1891 (1), the liability to do the work necessary to abate the nuisance is put upon the owner, and in order to make the defendant liable in this action the lease must shift that liability on to the tenant, contracts between landlord and tenant being preserved by s. 121 of the Act. There must be a clear intention to put the liability upon the tenant, and the language of this covenant is not sufficiently comprehensive to make the defendant liable. The covenant does not contain the words "whether imposed upon the landlord or the tenant," which have been held to make the tenant liable to pay such charges: *Budd* v. *Marshall* (2); *Aldridge* v. *Ferne* (3); *Thompson* v. *Lapworth* (4);

(1) By 54 & 55 Vict. c. 76, s. 4, sub-s. 3 (*a*), the notice by the sanitary authority requiring the abatement of a nuisance is, where the nuisance arises from any want or defect of a structural character, to be served on the owner.

(2) (1880) 5 C. P. D. 481.

(3) (1886) 17 Q. B. D. 212.

(4) (1868) L. R. 3 C. P. 149.

Allum v. *Dickinson*. (1) The defendant only covenants to "pay" the rates, &c., and not to "bear, pay, and discharge" them, which was the language of the covenants in *Budd* v. *Marshall* (2), *Smith* v. *Robinson* (3), *Crosse* v. *Raw* (4), *Clayton* v. *Smith* (5), and *Sweet* v. *Seager* (6), in all of which the tenant was held liable. The word "duties" is no doubt wide in scope, but it is not sufficient to cast upon the tenant a burden placed by the statute upon the landlord.

[He also cited *Tidswell* v. *Whitworth* (7); *Hill* v. *Edward* (8); *Home and Colonial Stores* v. *Todd* (9); *Lyon* v. *Greenhow* (10); *Payne* v. *Burridge*. (11)]

Haldinstein, for the plaintiff. The defendant is liable under this covenant. The case is substantially indistinguishable from *Budd* v. *Marshall* (2) and *Thompson* v. *Lapworth* (12), in each of which cases the covenant contained the word "duties," which is the important word in the present case. A covenant to "pay" without the addition of the words "bear and discharge" is sufficient to make the tenant liable, if the language of the covenant is in other respects sufficiently comprehensive: *Hartley* v. *Hudson*. (13)

Cur. adv. vult.

Jan. 29. The written judgment of the Court (Wright and Bruce JJ.) was delivered by

BRUCE J. In this case we are of opinion that the decision of the learned county court judge must be upheld. The plaintiff, the landlord, was required by the vestry, by virtue of the powers conferred by the Public Health (London) Act, 1891, to abate a nuisance arising from the state of the drains of the house 58, York Terrace, and she was required to take up the defective drain and lay a proper drain throughout the premises. The plaintiff did the work as required by the vestry, and in so

(1) (1882) 9 Q. B. D. 632.
(2) 5 C. P. D. 481.
(3) [1893] 2 Q. B. 53.
(4) (1874) L. R. 9 Ex. 209.
(5) (1895) 11 T. L. R. 374.
(6) (1857) 2 C. B. (N.S.) 119.
(7) (1867) L. R. 2 C. P. 326.
(8) (1885) 1 T. L. R. 253.
(9) (1891) 63 L. T. 829.
(10) (1892) 8 T. L. R. 457.
(11) (1844) 12 M. & W. 727.
(12) L. R. 3 C. P. 149.
(13) (1879) 4 C. P. D. 367.

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doing incurred an expense of 43*l.* 18*s.* She brought her action to recover this sum from the defendant, who was tenant of the premises under a lease. By the covenants in the lease the tenant covenanted to pay the yearly rent without any deduction or abatement whatsoever, and to pay the land tax, sewers rate, and all other taxes, rates, *duties*, assessments, and impositions, parliamentary, parochial, or otherwise, which then were or should at any time during the demise be assessed or imposed on or in respect of the demised premises. We think that the obligation imposed upon the landlord to take up the defective drain and lay a new one was a duty imposed on her in respect of the demised premises, and is within the words of the covenant.

We cannot distinguish this case from the case of *Payne* v. *Burridge* (1), where the words of the covenant were almost precisely the same as the words in the covenant in the present case. *Payne* v. *Burridge* (1) was followed in *Sweet* v. *Seager*. (2) That was a case in which the question arose respecting the expense of drainage works under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), the provisions of which very closely resemble the enactments by virtue of which the plaintiff in the present case was compelled to pay the money now in question. The covenant in that case contained the words "charges, impositions, contributions, burthens, *duties*, and services." The covenant in the present case does not contain the words "charges, contributions, burthens," but it does contain what I think is the governing word, "duties," and we think that the case of *Sweet* v. *Seager* (2) applies. In *Thompson* v. *Lapworth* (3), where the vestry of a parish compelled the landlord of premises to pay his proportion of the expense of paving the street upon which the premises abutted, it was held that he was entitled to recover the amount from his tenant, who had entered into a covenant to pay all taxes, rates, *duties*, and assessments which, during the continuance of the demise, should be taxed, assessed, or imposed on the tenant or landlord of the premises in respect thereof. The words of the covenant

(1) 12 M. & W. 727. (2) 2 C. B. (N.S.) 119.
(3) L. R. 3 C. P. 149.

in that case, so far as the description of the assessments or duties imposed are concerned, contain no words that are not to be found in the present case; but it was contended by the defendant's counsel that the words "imposed on the tenant or landlord," which were in the covenant in that case and are not in the covenant in the present case, distinguished the case from the present. We cannot attach any importance to the omission of those words in the present case.

The expenses in question in the present case were incurred by virtue of a duty imposed in respect of the premises. If the words had been inserted, "assessed or imposed upon any person or persons in respect of the premises," the added words would not, as it seems to us, have given any greater scope to the covenant. The words "in respect of the premises" are used in contradistinction to the words "on the premises," and an assessment or duty made or imposed not on the premises, but in respect of the premises, must be made or imposed upon some person in respect of the premises; and an assessment duly made or imposed upon any person in respect of the premises seems to us to come within the meaning of the covenant. This we think is sufficiently clear from the judgment of the Court in *Thompson* v. *Lapworth*. (1) The Court in that case proceeded upon the authority of the case of *Payne* v. *Burridge*. (2)

In the covenant in *Payne* v. *Burridge* (2) the phrase "imposed on the tenant or landlord" did not occur, and yet Willes J., in his judgment in *Thompson* v. *Lapworth* (1), says: "I cannot, without carping at words, point out any distinction between that case" (referring to *Payne* v. *Burridge* (2)) "and the case now before us." It is quite true, in the later part of his judgment in *Thompson* v. *Lapworth* (1), Willes J., when speaking of *Tidswell* v. *Whitworth* (3), said that the covenant in that case did not contain the language which the covenant in *Thompson* v. *Lapworth* (1) contained—namely, duties and assessments assessed or imposed *on the landlord* in respect of the premises. But the observation was made with reference to the decision in *Tidswell* v. *Whitworth* (3), which was a decision

(1) L. R. 3 C. P. 149. (2) 12 M. & W. 727.
(3) L. R. 2 C. P. 326.

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upon the terms of a local improvement Act, and was in effect that the payment made by the plaintiff, the landlord, was not for a rate, assessment, or imposition which had become payable in respect of the demised premises, but for a breach of duty imposed upon the landlord and not within the words of the tenant's covenant. In *Tidswell* v. *Whitworth* (1) the word "duties" does not occur in the covenant; and it is clear from the judgment of Bovill C.J. that the absence of that word, or any similar word, was relied upon by the Court.

The observations of Willes J. in *Thompson* v. *Lapworth* (2) upon *Tidswell* v. *Whitworth* (1) only go to shew that, in the absence of the word "duties," such words as "assessed or imposed upon the landlord" might give a wider scope to the covenant but certainly cannot, we think, be taken to imply that when the covenant contains the word "duties" the absence of such words as "assessed or imposed upon the landlord" can be taken to narrow the force of the phrase "duties imposed in respect of the premises."

In *Rawlins* v. *Briggs* (3) the covenant was held not to apply because the money the landlord sought to recover did not come within the words "rates, charges, assessments, and impositions charged, assessed, or imposed on the premises demised or in respect thereof." Following the case of *Tidswell* v. *Whitworth* (1), it was held that the Public Health Act imposed upon the landlord (the plaintiff) the duty of removing the nuisance, and that the performance of that which was imposed as a duty could not become a charge upon the tenant without express words. But had the covenant in the case contained the word "duties," it is quite consistent with the reasoning of the judgment that the covenant would have been held to cover a duty imposed in respect of the premises. Indeed, Lindley J., in distinguishing the case from *Thompson* v. *Lapworth* (2), points out that in *Thompson* v. *Lapworth* (2) the covenant contained the word "duties."

In the case of *Budd* v. *Marshall* (4) the majority of the Court of Appeal approved of the decision in *Thompson* v. *Lapworth* (2),

(1) L. R. 2 C. P. 326.
(2) L. R. 3 C. P. 149.
(3) (1878) 3 C. P. D. 368.
(4) 5 C. P. D. 481.

and held that a tenant who had covenanted with the landlord to bear, pay, and discharge all taxes, rates, duties, and assessments was liable on that covenant to make good to the landlord the expenses of sewage works which the landlord had been compelled to execute under the Public Health Act, 1875.

Allum v. *Dickinson* (1) was decided upon the ground that the sum sought to be recovered was not a charge upon the premises, but was a charge imposed upon the owner, and there were no words in the covenant rendering the tenant liable for charges or duties imposed upon the owner; and in *Wilkinson* v. *Collyer* (2) Manisty J., in giving judgment in favour of the tenant, expressly distinguishes the case from *Thompson* v. *Lapworth* (3) and *Budd* v. *Marshall* (4), on the ground that the word "duties" was not contained in the covenant. In *Aldridge* v. *Ferne* (5), where the tenant was held liable, the covenant contained the word "outgoings," which Grove J. said was at least as strong as "duties" which had been relied upon in some of the cases.

The cases are very numerous: we have not reviewed the whole of them, but we have, we think, referred to most of the important decisions; and we think we should be going contrary to the current of the decisions if we were to hold that the words in the covenant, "duties imposed in respect of the premises," are not wide enough in scope to entitle the plaintiff to recover in the present action.

Appeal dismissed.

Solicitors for plaintiff: *Smith & Rydon.*

Solicitors for defendant: *Steavenson & Couldwell.*

(1) 9 Q. B. D. 632.
(2) (1884) 13 Q. B. D. 1.
(3) L. R. 3 C. P. 149.
(4) 5 C. P. D. 481.
(5) 17 Q. B. D. 212.

W. J. B.

1896
Dec. 17.
1897
Feb. 8.

SMITH *v.* THE CHORLEY DISTRICT COUNCIL.

Local Government—Refusal to approve Building Plans—Action of Mandamus —Prerogative Writ.

An action of mandamus will not lie to compel a local authority to approve building plans. The proper remedy is by applying for a prerogative writ of mandamus.

FURTHER CONSIDERATION before Kennedy J.

The plaintiff was the owner of certain land at Chorley, in the county of Lancaster, in respect of which the defendants were the sanitary authority.

In September, 1896, the plaintiff proposed to build certain houses upon the land in question, and accordingly deposited with the defendants plans of the houses he proposed to erect in accordance with their by-laws.

The defendants, being of opinion that the proposed houses amounted to a laying out or constructing of a new street, declined to sanction such plans, on the ground that the width of such street would be contrary to their by-laws in that behalf.

The plaintiff then commenced this action for a mandamus to compel the defendants to pass the plans.

The action was tried at Manchester before Kennedy J. and a special jury, when the jury found in answer to the learned judge that the proposed erections by the plaintiff did not amount to laying out a new street.

E. Sutton, and *Sington*, for the plaintiff, moved for judgment. The plaintiff has taken the proper course in proceeding by action of mandamus under Order LIII. and s. 25, sub-s. 8, of the Judicature Act, 1873. That is the more convenient course to take, and although in such cases the matter may be dealt with by a prerogative writ of mandamus (*Reg.* v. *Mayor of Newcastle-upon-Tyne* (1); *Reg.* v. *Vestry of St. George's, Southwark* (2)), the right remedy is by action of mandamus where

(1) (1889) 60 L. T. (N.S.) 963. (2) (1892) 67 L. T. (N.S.) 412.

the remedies are equally convenient: *Reg.* v. *Lambourn Valley Ry. Co.* (1); *Reg.* v. *Harrogate.* (2) The Court will grant a mandamus where a local authority has wrongly exercised its discretion: *Reg.* v. *Ormesby Local Board* (3); *Reg.* v. *Fulwood Local Board.* (4)

C. A. Russell, Q.C., and *F. H. Mellor*, for the defendants. An action of mandamus will not lie in such a case. The Court will not act as a Court of Appeal from bonâ fide decisions of local authorities: *Reg.* v. *Vestry of St. Pancras* (5); *Reg.* v. *Deputies of Freemen of Leicester.* (6) In *Reg.* v. *Ormesby Local Board* (3) the local board had misconstrued the section on which they purported to act, and there was therefore no exercise of their discretion. In order to justify the Court in issuing a mandamus to a local authority, there must be a neglect or refusal to act on their part.

But even if a mandamus will lie, the proper remedy is not by action of mandamus, but by an application for the prerogative writ.

The only case which can be found in which an action of mandamus has been successful under such circumstances is *Reg.* v. *Harrogate* (2), which is based on a misunderstanding of *Reg.* v. *Lambourn Valley Ry. Co.* (1) That case has now been explained in *Reg.* v. *London and North Western Ry. Co.* (7) and *Reg.* v. *Vestry of St. George's, Southwark.* (8) On the other hand, there are numerous cases of successful applications to the Court under similar circumstances for the prerogative writ of mandamus: *Reg.* v. *Mayor of Newcastle-upon-Tyne* (9); *Reg.* v. *Tynemouth Rural District Council* (10); *Reg.* v. *Corporation of Preston.* (11) It is settled law that mandamus cannot be claimed where there is any other remedy: *Bush* v. *Beavan* (12); *In re Nathan.* (13) The action of mandamus was created by Order LIII. and s. 25, sub-s. 8, of the Judicature Act, 1873,

(1) (1888) 22 Q. B. D. 463.
(2) Lumley's Public Health, 5th ed. p. 218.
(3) (1894) 43 W. R. 96.
(4) (1895) 72 L. T. (N.S.) 592.
(5) (1890) 24 Q. B. D. 371.
(6) (1850) 15 Q. B. 671.
(7) [1894] 2 Q. B. 512.
(8) 67 L. T. (N.S.) 412.
(9) 60 L. T. (N.S.) 963.
(10) [1896] 2 Q. B. 219.
(11) (1887) 3 T. L. R. 665.
(12) (1862) 32 L. J. (Ex.) 54.
(13) (1884) 12 Q. B. D. 461.

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which took the place of s. 68 of the Common Law Procedure Act, 1854. It is a remedy ancillary to existing rights of action, and does not give any new right of action: *Glossop* v. *Heston and Isleworth Local Board* (1); *Reg.* v. *Vestry of St. George's, Southwark* (2); *Baxter* v. *London County Council.* (3)

Cur. adv. vult.

1897. Feb. 8. KENNEDY J. This was an action tried before me with a jury at the Manchester Assizes. It was brought against the defendants, who are the rural sanitary authority of the district, claiming a mandamus to compel them to pass certain building plans submitted by the plaintiff, which the defendants had disapproved.

It is enough to say here that if the plaintiff was in fact laying out a new street the disapproval of his plans by the defendants was right, and if he was not laying out a new street that disapproval was wrong. It was not contended that the defendants had not honestly taken the matter into consideration and fairly come to their decision, but it was said that the facts did not justify the conclusion arrived at by the defendants.

The jury, after hearing the evidence and having had a view of the locality, found by their verdict that the plaintiff was not laying out a new street.

At an early stage of the case, counsel for the defendants submitted that no action for a mandamus would lie, and that the only proceeding open to the plaintiff, if he was right in his contention, was by an application to the Queen's Bench Division for a prerogative writ of mandamus.

After the verdict of the jury I heard argument as to this; and now, having carefully considered the arguments and the numerous authorities cited or referred to in the course of them, I have come to the conclusion that the defendants' contention is well founded, and that this action for a mandamus cannot be maintained.

It is clear upon the authorities, I think, that if the facts were as the jury found them, the plaintiff might successfully apply to

(1) (1879) 12 Ch. D. 102. (2) 67 L. T. (N.S.) 412.
(3) (1890) 63 L. T. (N.S.) 767.

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the Divisional Court of the Queen's Bench Division for a prerogative writ of mandamus. In *Reg.* v. *Corporation of Newcastle-upon-Tyne* (1) the corporation had disapproved building plans under an unjustifiable assumption of a discretionary power under their local Act and by-laws, and the Court, consisting of Field and Cave JJ., made a rule for a mandamus absolute, requiring the corporation to approve the plans. In *Cook* v. *Hainsworth* (2) a case had been stated by the stipendiary magistrate for Leeds as to the conviction of the appellant under a by-law for building after the corporation had disapproved the plans. Lord Russell of Killowen C.J. said: "A duty is imposed on the corporation to approve or disapprove within the specified time, and, therefore, if the owner is advised that his plans are good, he can come to this Court for a mandamus, as was done in *Reg.* v. *Corporation of Newcastle-upon-Tyne* (1); in such a case this Court could command the corporation to do one thing or the other, that is, either to approve or disapprove, according to the view the corporation might take of the plans."

Still more recently, considered judgments were given by the same Court (Lord Russell of Killowen C.J. and Wills J.) to the same effect: *Reg.* v. *Tynemouth Rural District Council.* (3) An earlier case of the same kind is *Reg.* v. *Corporation of Preston.* (4)

Mr. Russell argued that I ought to infer from this recognition by the Court of the remedy by the grant of the prerogative writ of mandamus that an action of mandamus would not lie in such cases, because the grant of the writ must be taken to involve the decision that an efficacious remedy by action does not exist.

It is no doubt a settled general rule of the Court with regard to the application for a prerogative writ of mandamus that it will not be granted if another sufficient remedy is open to the applicant: *In re Nathan.* (5) But looking at the authorities, I do not think that in this particular class of case, where the question is one of a public nature, a conclusive inference, such

(1) 60 L. T. (N.S.) 963.
(2) [1896] 2 Q. B. 85.
(3) [1896] 2 Q. B. 219.
(4) 3 T. L. R. 665.
(5) 12 Q. B. D. 461.

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as I was invited to draw, can safely be drawn. Some part of the principal judgment in *Reg.* v. *Lambourn Valley Ry. Co.* (1) might at first appear to warrant such an inference; but it has since been judicially explained. In *Reg.* v. *London and North Western Ry. Co.* (2), where application was made for a prerogative writ of mandamus to compel the company to take up an award, Wright J., in delivering the judgment of the Court, which consisted of Cave J. and himself, stated the law upon this point as follows (3): "It is said that even if at one time a writ of mandamus was the proper remedy under the Lands Clauses Act it has ceased to be so since the Common Law Procedure Act, 1854, and for that the case of *Reg.* v. *Lambourn Valley Ry. Co.* (1) is cited. Of course, we deal with that case with all possible respect as a decision which binds us on a matter in pari materiâ; but there the Court was not dealing with a question of this kind. The decision in that case I have never heard questioned as a decision, and I do not suppose it ever will be. It was a dispute whether an action or a prerogative writ of mandamus was the proper remedy in that particular case. But Pollock B., in the course of his judgment, appears to say that it is an answer to any application for a prerogative writ of mandamus if it is shewn that a mandamus could have been granted for the same purpose in an action. I say, and I have said with the assent of other judges at various times, that that would be unduly to narrow the powers of this Court to grant a prerogative writ of mandamus. There must be many cases in which a prerogative writ of mandamus ought to be granted for the purpose of speedy justice or other reasons in which it would be uncertain whether it was possible to achieve the same results in any other way, and if it were possible, would take much time and difficulty." In his judgment in *Reg.* v. *Vestry of St. George's, Southwark* (4), the same learned judge practically repeats these observations.

Whilst, however, I cannot draw a conclusive inference against the existence of a remedy by action from the series of successful applications to the Court for a writ of mandamus under similar

(1) 22 Q. B. D. 463.
(2) [1894] 2 Q. B. 512.
(3) [1894] 2 Q. B. 518.
(4) 67 L. T. (N.S.) 412.

circumstances, it is impossible not to attach considerable weight to the long course of practice and to the absence, so far as I am aware, of any prior attempt in this class of cases to seek a remedy by action. It is all the more remarkable if, as the plaintiff's counsel has contended, the remedy by action would really be the simpler and less cumbrous. The only suggested make-weight to these considerations in the defendants' favour, so far as authority is concerned, appears to me to be that in one unreported case which is cited in the 5th edition of Lumley upon Public Health, at p. 218, *Reg.* v. *Harrogate*, a Divisional Court did in a similar case to the present refuse to grant a prerogative writ on the ground that an action for a mandamus would lie.

There was a good deal of argument before me upon the question of convenience. If the matter were res integra, it appears to me that there is much which might be fairly urged on both sides. On the one hand, there is the inexpediency of actions in matters of this kind affecting public bodies, which is dwelt upon by James L.J. in *Glossop* v. *Heston and Isleworth Local Board* (1), in a passage referred to with approval by Lord Herschell in *Cowley* v. *Newmarket Local Board*. (2) On the other hand, it might be urged that a trial before a jury who see and hear the witnesses, and can visit the locality, as the jury did in the present case, is more satisfactory than the procedure by evidence on affidavit upon the application to the Court for the prerogative writ. The question whether a street is being laid out as a new street is a matter which frequently does come now before the ordinary tribunals, as, for example, in *St. George's Local Board* v. *Ballard* (3), tried before Lawrance J. without a jury, where the local board sought an injunction against a builder who was proceeding to build in spite of their disapproval of his plans. His judgment, afterwards affirmed by the Court of Appeal, turned upon the question whether it was or was not a new street that was being laid out; and I myself have recently had to try an action (4) brought by a builder

(1) 12 Ch. D. 102.
(2) [1892] A. C. 345, at p. 352.
(3) [1895] 1 Q. B. 702.
(4) *Harrison* v. *Yeadon Urban District Council* (not reported), Oct. 31, 1896.

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against a local board for pulling down buildings which he had erected without their approval in which the same question arose for decision.

But considerations of convenience are not considerations which can affect my judgment one way or the other; although there is no direct authority on the exact point in this case, I do not think that I could decide in the plaintiff's favour without disregarding some very weighty expressions of judicial opinion to which I was referred in the course of the argument. The plaintiff, in asserting his right to maintain an action for mandamus, relies upon the Judicature Act of 1873, s. 25, sub-s. 8, and Order LIII., which may be taken to be substantially equivalent to s. 68 of the Common Law Procedure Act, 1854. Will an action for a mandamus lie under these enactments against a public body to require them to perform the statutory duty of which the plaintiff demands the performance in this case?

In the course of his judgment in *Glossop* v. *Heston and Isleworth Local Board* (1), Lord Esher (then Brett L.J.) observed (2): "Then it is said that nevertheless the defendants are liable to a mandamus to do their duty. Now supposing they had neglected or refused to do their duty, then I think they would have been liable to a mandamus, but not to a mandamus to be granted by the Chancery Division. It would have been a prerogative mandamus, as it is called, to them as a public body to enter upon and do their duty. That, as it seems to me, under the Judicature Act as it was before, is a remedy that can be granted only in the Court of Queen's Bench. I think the mandamus spoken of in the 8th sub-section of the 25th section of the Judicature Act is not the prerogative mandamus, but only a mandamus which may be granted to direct the performance of some act—of something to be done which is the result of an action where an action will lie."

Referring to this passage in *Reg.* v. *Vestry of St. George's, Southwark* (3), where the Court granted a mandamus to the vestry to levy a rate, Wright J. observed (4): "I am not at all sure that an action for a mandamus could have been brought in this case. I think it is very doubtful whether the provision for a

(1) 12 Ch. D. 102.
(2) 12 Ch. D. at p. 122.
(3) 67 L. T. (N.S.) 412.
(4) 67 L. T. (N.S.) at p. 415.

mandamus given either by the Common Law Procedure Act or the Judicature Act extends at all to any relief that could not have been claimed in an action before the Common Law Procedure Acts, and whether the remedy given is not intended there merely as an additional mode of enforcing judgment which the Court has power to give."

The last authority to which I think it right to refer is the judgment cited by counsel of Day J. in *Baxter* v. *London County Council*. (1) In that case the action was brought originally against the Middlesex justices, for whom at a later stage the county council were substituted as defendants. The plaintiff claimed, first, under Order XXV., r. 5 (which was introduced in the year 1883), a declaration of right that he was entitled to a certain salary; and, secondly, payment of the arrears of salary up to date, and for an account. A mandamus for payment of the salary which was claimed originally upon the writ is stated to have been dropped when the London County Council were substituted as defendants. Day J. held that the plaintiff was right in his contention as to the salary, but that he could not recover anything in the action for the following reasons (2): "The true and only remedy which the plaintiff has for the purpose of enforcing the rights which I am of opinion he has got is by a prerogative writ of mandamus. When I objected that this was a matter for a mandamus, I was answered that this was an action for a mandamus. It is an action for a mandamus based upon the Common Law Procedure Act, 1854, and the action for a mandamus is simply an attempt to engraft upon the old Common Law remedy a right in the nature of specific performance. When private persons had rights one against the other, the Court had power to grant a mandamus or direct specific performance, or something in the nature of an injunction, to command that the right claimed by the one party should be acceded to by the other. But it was never contemplated that the action for a mandamus was to supersede the prerogative writ of mandamus. In this case no action will lie. I am perfectly clear that this is not an action which will lie between the parties, or a case in which a statutable mandamus will be applicable, because no action would lie, and a mandamus is only granted as ancillary to the action, and

(1) 63 L. T. (N.S.) 767. (2) 63 L. T. (N.S.) at p. 771.

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for the purpose of enforcing the private right in respect of which the private litigation had arisen. It was never contemplated that a private mandamus should be granted in cases in which a prerogative mandamus had from time whereof memory does not run to the contrary been alone the effective remedy." The learned judge then proceeds to deal with the claim as framed upon the declaration of right, with which I need not deal here.

The foregoing appear to me to be expressions of judicial opinion which bear closely upon the point which I have to decide in this case and which are adverse to the view which the plaintiff asks me to adopt. They are of course in themselves entitled to great weight, and after a careful consideration of the statutory enactments and the cases relating to the remedy of mandamus, I can see no justification in them for a different determination.

I may say that, so far as under the Common Law Procedure Act, 1854, there have been successful actions for a mandamus against public bodies: they appear to have been cases in which the relief by mandamus might properly be termed ancillary relief. So an action of mandamus has been brought against a local board of health to pay a debt due to the plaintiff (*Ward* v. *Lowndes* (1)), or to order a rate to be made by a local board of health in order to satisfy a judgment obtained by the plaintiff (*Worthington* v. *Hulton* (2)), or, again, to compel a corporation to apply their funds in payment of interest due on debentures: *Webb* v. *Commissioners of Herne Bay.* (3)

I hold, therefore, that this action cannot be maintained. I will only add that if I had been able to come to a different conclusion as to the right to maintain this action, I should have felt myself bound to give effect to the finding of the jury.

Judgment for the defendants.

Solicitors for plaintiff: *Rowcliffes & Co., for Jackson & Son, Chorley.*

Solicitors for defendants: *Crowders & Vizard, for Stanton, Chorley.*

(1) (1859) 28 L. J. (Q.B.) 265. (2) (1865) L. R. 1 Q. B. 63.
(3) (1870) L. R. 5 Q. B. 642.

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1897
Feb. 22.

LAMOND v. RICHARD AND THE GORDON HOTELS, LIMITED.

Innkeeper—Obligation to lodge Traveller—Guest losing character of Traveller—Cesser of Right to Lodging—Right of Innkeeper to give Notice to leave.

The common law liability of an innkeeper to receive and lodge a guest attaches only so long as the guest is a traveller, and a person who has been received at an inn as a traveller does not necessarily continue to reside there in that character. Whether at any given time during his residence he is still a traveller is a question of fact, and one of the ingredients for determining this fact is the length of time that has elapsed since his arrival. If the guest has lost the character of traveller the innkeeper is not bound to supply him with lodging, but is entitled, on giving reasonable notice, to require him to leave.

APPEAL from a decision of the judge of the Brighton County Court.

The action was brought to recover damages for unlawfully ejecting the plaintiff from a hotel in which she was residing; the facts, as given in evidence and found by the county court judge, were shortly these. The plaintiff, a lady of good position and good character, came in November, 1895, to the Hotel Metropole at Brighton, of which the defendant Richard was the manager, and stayed there until August 31, 1896, paying her bill regularly. It was alleged by the defendants that the plaintiff was under the delusion that enemies were seeking to injure her, and that complaints had been made by other visitors to the hotel; but it was expressly found by the learned county court judge that the condition and conduct of the plaintiff were not such as to justify the defendant in refusing her accommodation. On August 25 the under-manager, by instruction of the directors, had an interview with the plaintiff, in which, in answer to the question when she was going to leave the hotel, she said she should stay there as long as she liked; the under-manager thereupon gave the plaintiff verbal notice that her room must be at the manager's disposal by noon on the 27th. The plaintiff did not leave on the latter

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day, and on August 31 the plaintiff was told that she must leave, and that, if she declined, her luggage would be packed up by the hotel servants; in the afternoon she went out for a walk, and on her return was refused admission; her things had been packed by the servants and brought down into the hall, and were subsequently removed by the plaintiff. There were vacant rooms in the hotel at the time, and the plaintiff's room was not required for the accommodation of other guests. The learned judge found that the Hotel Metropole was a "common inn"; that the plaintiff had long ceased to be a traveller or wayfarer in the ordinary sense and had become a boarder or lodger, and that the defendants were entitled to determine the relation between themselves and the plaintiff on giving her reasonable notice; he therefore gave judgment for the defendants. The plaintiff appealed.

Carson, Q.C. (*Rose Innes* with him), for the plaintiff. The relation of host and guest having been once established, the host cannot determine that relation without good reason, except by agreement with the guest. Where the relation of host and guest does not exist at all, as in *Reg.* v. *Rymer* (1), the common law liability of an innkeeper to receive and entertain a guest never arises. Assuming that that liability is confined to the case of persons coming to the inn as travellers, the plaintiff was sufficiently a traveller to satisfy that requirement, and nothing happened to alter the character in which she originally came to the hotel. Mere lapse of time is not sufficient to change the relationship established at first between the parties. The lien of the innkeeper upon the goods of his guest is a right correlative to his duty to receive the guest, and if the character in which the guest came to the inn is changed to that of a boarder or lodger the innkeeper will lose his lien. [He also cited *Calye's Case* (2); *Rex* v. *Ivens* (3); *Turrill* v. *Crawley* (4); *Allen* v. *Smith* (5); *Gordon* v. *Silber* (6); Bac. Abr. Inns and Innkeepers, C. 5; 26 & 27 Vict. c. 41.]

(1) (1877) 2 Q. B. D. 136.
(2) (1584) 8 Co. Rep. 32; 1 Sm. L. C. (10th ed.) 115.
(3) (1835) 7 C. & P. 213.
(4) (1849) 13 Q. B. 197.
(5) (1862) 12 C. B. (N.S.) 638; 31 L. J. (C.P.) 306.
(6) (1890) 25 Q. B. D. 491.

Asquith, Q.C. (*S. H. Day* with him), for the defendants. The plaintiff's claim is entirely novel, and is founded, not on contract, but on the common law liability of innkeepers. The innkeeper's liability only extends to receiving travellers, and rests upon the ground that a traveller is entitled to hold the innkeeper to his profession until he prosecutes the next stage of his journey. Whether criminal or civil proceedings be taken against an innkeeper for not receiving a guest, the indictment or declaration must equally allege that the party complaining is a traveller: *Rex* v. *Luellin* (1); Bac. Abr. Inns and Innkeepers, C. 1; *Holder* v. *Soulby*. (2) Here the plaintiff had ceased to be a traveller, and the county court judge having found that as a fact, and also that she received reasonable notice, the judgment was right.

WRIGHT J. This case seems to me to be free from doubt. The principle on which this matter turns is laid down by Lord Chief Justice Holt in *Rex* v. *Luellin* (1), and these are the words of the report, and the whole of the report: "The defendant was master of the Bell Inn, in Bristol. He was indicted for not receiving one taken ill with the small-pox; and it was quashed, for not saying he was a traveller." That decision is cited and referred to in *Reg.* v. *Rymer* (3), where Kelly C.B. says: "The second question is, whether the prosecutor was a traveller. I need hardly cite authorities to shew that it is essential to such a prosecution that the prosecutor should be a traveller. If any be wanted"—then he refers to the case of *Rex* v. *Luellin*. (1) Then Denman J. says: "The principles laid down in *Burgess* v. *Clements* (4) shew that the object of the law upon the subject of an innkeeper's liability is merely to secure that travellers shall not, while upon their journeys, be deprived of necessary food and lodging." That obviously is the principle on which the liability rests, and it is clear, I think, that the obligation exists only so long as the person is a traveller, and exists towards him only in so far as he is a traveller.

(1) (1700) 12 Mod. 445.
(2) (1860) 8 C. B. (N.S.) 254, at p. 264.
(3) 2 Q. B. D. 136.
(4) (1815) 4 M. & S. 306.

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Wright J.

The only alternative is that he might be entitled to call on the innkeeper to entertain him for life, subject to certain possible exceptions for making provision for other travellers at reasonable times and so forth. No doubt, so long as the guest stays in the hotel, even though he has ceased to be a traveller, the lien incident to the relation of host and guest continues; but I do not think that that in any way affects the proposition that the peculiar obligation to receive a person arises only while he is a traveller, and continues so long as is reasonably necessary for giving him entertainment as a traveller.

BRUCE J. I am of the same opinion. I think that all the older authorities shew that the obligation to receive attaches only in cases where a person is on a journey. The form of declaration in Bullen and Leake shews that, because the allegation in the declaration is that the person was then travelling; so also I think that the obligation was to receive him only so long as he was a traveller, because the breach there alleged is that "he did not nor would he receive and lodge the plaintiff in the said inn then and during the said night." The only authority that has been cited to us against the older authorities is the dictum of Lopes L.J. in *Gordon* v. *Silber*. (1) That dictum was not necessary for the decision of the case in dispute, because the learned Lord Justice was there discussing another matter, and I do not think he was at all intending to lay down the law in conflict with the older authorities.

Appeal dismissed.

W. J. B.

The plaintiff appealed.

Carson, Q.C., and *Rose Innes*, for the plaintiff, in addition to the arguments urged in the Divisional Court contended that, apart from custom, the proprietors of the large modern hotels held themselves out as being willing to receive any member of the public, so long as he conformed to the rules of the hotel and paid for the accommodation.

Asquith, Q.C. (*S. H. Day* with him), for the defendants.

(1) 25 Q. B. D. 491.

LORD ESHER M.R. The plaintiff went to a hotel in Brighton, and went there with the intention of staying at the hotel. She was taken in and given rooms, and she stayed there for a period of ten months. It was then intimated to her that the direction wished her to leave, but this she refused to do. Then notice was given to her requiring her to leave, and as she still refused, advantage was taken of her being out of the hotel, and her things were brought down and put outside, and on her return she was refused admittance.

The foundation of her action is that she was not allowed to stay on at the hotel. It was tried before the county court judge of Brighton without a jury, and he has arrived at certain conclusions of fact. He has found that the plaintiff was taken into the hotel as a traveller according to the custom of England, and to find that he must have also found that the hotel carried on business according to the custom, so that the proprietors were bound to take in every one that came and asked for lodgings, if there was room for them. He finds that she stayed so long at the hotel that at last notice was given to her to leave; and his findings are equivalent to saying that, when the notice was given, she was no longer a traveller, nor entitled to be treated as such under the custom. If this is a question of fact it is not subject to appeal.

The learned judge must have found that the proprietors of the hotel held it out to the public as an inn that would take in any traveller who came, provided there was room to do so. I think it is a question of fact what was the intention of those who carried on the business of the hotel, and the county court judge has stated what that intention was. Such a finding in this case does not affect the position of other hotels, and I think it is open to argument that the large London hotels do not hold themselves out as receiving customers according to the custom of England—at any rate, such a matter would be a question of fact.

Then comes the question whether the plaintiff went to the hotel in the capacity of a traveller. That is also a question of fact which the county court judge has determined.

The plaintiff has brought this action relying on the custom

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of England, and not on the point raised now for the first time of a contract outside the custom. The question is whether it is the law that if a person goes to an inn in the character of a traveller that person retains the same character for any time however long. If so, the law would be contrary to the truth; and I will never submit, unless compelled by an Act of Parliament, to say that a thing shall be deemed to be that which it is not. Therefore, the question whether a person has ceased to be a traveller seems to me again to be a question of fact, and mere length of residence is not decisive of the matter, because there may be circumstances which shew that the length of the stay does not prevent the guest being a traveller, as, for instance, where it arises from illness; but it is wrong to say that length of time is not one of the circumstances to be taken into account in determining whether the guest has retained his character of traveller. In my opinion there was in this case evidence of facts which justified the county court judge in saying that the plaintiff had ceased to be a traveller. If this is a question of fact, there is no appeal from the decision of the judge; but even if there were an appeal, I agree with the conclusion to which he came, that the evidence shewed that the plaintiff was no longer a traveller. Her case, therefore, was not within the custom, and the relations between her and the innkeepers were not under the custom.

It is put as an objection that if the relation between them is changed the rights of the innkeeper against the plaintiff had ceased. I do not say whether this is so, but the argument is not sufficient to prevent the conclusion at which I have arrived, that the relation may be altered from the original one of traveller and innkeeper.

Then we were asked to imply a contract or agreement by both parties, by which the innkeeper contracted to lodge the plaintiff so long as she wished to stay, upon the same terms as those upon which she was taken in, so that she was under no obligation to stay an hour longer than she chose, but he was bound to keep her so long as she liked to remain. To my mind such a contract cannot have been the intention of the parties when the relationship commenced.

I think, therefore, there is no ground for disturbing the decision in this case, and the appeal must be dismissed.

LOPES L.J. The law of England imposed exceptional liabilities on an innkeeper and gave him exceptional rights. But these exceptional liabilities and rights applied only as between the innkeeper and those persons who came to the inn in the character of travellers. This is shewn clearly by the old form of writ against an innkeeper for refusing to supply food and lodging, and from the old form of declaration, which will be found in Bullen and Leake's Precedents of Pleading. The question before us is, in what character was the plaintiff living at the inn when she received notice to quit it? Was she there as a traveller, or had she ceased to be a traveller and remained in some other capacity? I cannot help thinking that this is a question of fact on which the finding of the judge was conclusive; but I do not desire to rest my judgment on that ground, which may be regarded rather as technical. In my opinion there is no such rule as is suggested, that a person who comes to an inn as a traveller and remains there must remain as a traveller. In my opinion the learned judge was right when he found that the plaintiff when she was required to leave had ceased to be a traveller, and that, therefore, the innkeeper was fully justified, after giving reasonable notice, in acting as he did. His judgment and that of the Divisional Court supporting it should be affirmed.

CHITTY L.J. The plaintiff's claim is founded on the liability imposed by the general custom of England on the keeper of a common inn. There is no question of contract raised between the parties. The county court judge found, either as a question of fact or a mixed question of law and fact, that the defendants' hotel was an inn, and from that finding there is no appeal. Starting from that point, he considered whether the plaintiff, after being in the hotel for a period of ten months and considering all the circumstances of the case, still retained the character of a traveller which he attributed to her when she first went to the inn; and he decided, and this also may be a

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question of mixed fact and law, that she did not retain it. If this is a question of fact there is nothing more to be said on the appeal. The plaintiff's counsel, however, tried to treat it as a question of law; and turn his proposition about as you will it still comes to this, that if a person once enters an inn as a traveller he can remain there in that character as long as he pleases. With reference to this proposition, though there are many authorities on the question of the common law liability of an innkeeper, no suggestion to this effect can be found, and in my opinion it is not the law. It may be a difficult question to determine in any case when the character of traveller ceases and that of lodger or boarder begins; but in this present case I think the judge was entitled on the evidence to come to the conclusion at which he arrived, that the plaintiff had ceased to be a traveller. The custom of England does not extend to persons who are in an inn as lodgers or boarders, and the length of time that a guest has stayed is a material ingredient in determining such a question as was before the judge. If the character of traveller is continuous it would follow that the plaintiff would have a right to reside at the hotel all her life, provided she conformed to the regulations and paid her bills, but that she could leave at any moment, while the landlord would be bound to provide lodging without any power to give notice to her to leave. This is a startling proposition, and, as it is moreover unsupported by authority, I cannot assent to it. It is hardly necessary to say anything about the suggested implied contract. The action was not founded on it, and the proposition itself will not bear examination. For these reasons I concur in the judgments already delivered.

Appeal dismissed.

Solicitor for plaintiff: *R. E. Campbell.*

Solicitors for defendants: *Stanley, Woodhouse & Hedderwick.*

A. M.

GOLDSTEIN *v.* VAUGHAN.

1897
March 13.

Factory Acts—Jews—Employment on Sunday—"Open for Traffic"—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), *s.* 51.

By s. 21 of the Factory and Workshop Act, 1878, "A . . . . young person or woman shall not (save as is in this Act specially excepted) be employed on Sunday in a . . . . workshop."

By s. 51, "No penalty shall be incurred by any person in respect of any work done on Sunday in a . . . . workshop by a young person or woman of the Jewish religion, subject to the following conditions:—"

"(2.) The . . . . workshop . . . . shall not be open for traffic on Sunday."

The occupier of a workshop, wherein young persons and women of the Jewish religion were employed on Sunday, carried on there the business of making button-holes for tailors on garments delivered to him by them for that purpose.

The workshop was open to his customers on Sunday for the purpose of enabling them to send or fetch away garments in pursuance of contracts previously made, but not for the purpose of their giving fresh orders:—

Held, that the workshop was not thereby "open for traffic on Sunday," within the meaning of s. 51, so as to deprive the occupier of the exemption afforded by that section.

CASE stated by a metropolitan police magistrate.

The respondent was one of Her Majesty's inspectors of factories and workshops.

The appellant was a button-hole machinist, his business being to make button-holes for master tailors. He was of the Jewish religion, and, having his workshop closed on Saturdays, had availed himself of an exception under Part II. of the Factory and Workshop Act, 1878 (1), which entitled him if he thought

(1) By s. 21 of the Factory and Workshop Act, 1878, "A child, young person, or woman shall not (save as is in this Act specially excepted) be employed on Sunday in a factory or workshop."

By s. 51, "No penalty shall be incurred by any person in respect of any work done on Sunday in a factory or workshop by a young person or woman of the Jewish religion, subject to the following conditions:—

"(1.) The occupier of the factory or workshop shall be of the Jewish religion; and

"(2.) The factory or workshop shall be closed on Saturday, and shall not be open for traffic on Sunday; and

"(3.) The occupier shall not avail himself of the exception authorizing the employment of young persons and women on Saturday evening, or for an additional hour during any other day of the week."

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proper to employ women and young persons on Sundays, subject to the condition (inter alia) that his workshop should not be open for traffic on Sunday.

The appellant's mode of doing business was as follows. He entered into arrangements with his customers under which he was to make button-holes in their garments at certain prices. They sent the garments to the workshop, and fetched them away when the work was done. The button-holes were not paid for at the time the work was left or when it was fetched away, but accounts were kept and settlements made at times quite independent of these visits. The workshop was open on Sunday in order that such customers might send or fetch away garments in pursuance of arrangements previously made, but it was not kept open on Sunday for the purpose of making an arrangement either with an old or new customer, nor for the receipt of work from a casual customer, nor for the payment of work already done, nor for the settlement of any accounts with respect to work done or to be done.

The appellant employed on Sunday, September 20, 1896, in his workshop one Annie Closcaoridge, a woman of the Jewish religion.

An information having been laid against the appellant under s. 21 of the above-mentioned Act in respect of the employment of the said woman, the magistrate was of opinion that the workshop was "open for traffic" on Sunday within the meaning of s. 51; and he accordingly convicted the appellant subject to a case for the opinion of the Court.

Channell, Q.C., and *Israel Davis*, for the appellant. The primary and ordinary signification of the word "traffic" is trade—the exchange of goods or merchandise for an equivalent: Webster's Dictionary. In that sense the appellant's premises were not open for traffic. There was no bargaining done on the Sunday. If the premises had been open for any person to come in and inquire the prices of work and bargain about it, that would have been another matter. Here all that was done was to bring the raw material to and fro. That was in the nature, not of traffic, but of carriage.

H. Sutton, for the respondent. A workshop is open for traffic unless all business intercourse with the outside world is cut off.

CAVE J. It is not easy to construe the words "open for traffic," but I think the view that the magistrate took is too narrow. It is obvious that if that had been done which he finds was not done, that is to say, if members of the public could have come in and out on the Sunday and given their orders, and made their arrangements for having these button-holes made, and bargained about the price of the work just as they did on other days, the workshop would have been open for traffic on the Sunday. But I have a difficulty in seeing that it could be said to be open for traffic when all that was done was that the customers with whom the business arrangements had been previously made brought or fetched away their things on the Sunday. The case must go back to the magistrate with this expression of our opinion.

GRANTHAM J. I am of the same opinion. Here it is found as a fact that all the business arrangements with the customers were made beforehand on some day other than Sunday. That being so, I do not think that the mere fact that the garments were delivered on a Sunday would cause the workshop to be open for traffic.

Conviction quashed.

Solicitor for appellant: *T. W. Moore.*
Solicitor for respondent: *Solicitor to the Treasury.*

J. F. C.

1897
March 15.

CLARKE *v.* LONDON AND COUNTY BANKING COMPANY.

Banker—Crossed Cheque—Receipt of Payment for Customer—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.

Where a crossed cheque is delivered to a banker by a customer for collection, and the banker receives payment of it and places the amount to the customer's account, the fact that the customer's account is overdrawn at the time does not make such receipt of payment by the banker any the less a receipt of payment for the customer within the meaning of s. 82 of the Bills of Exchange Act, 1882, or disentitle the banker to the protection of that section.

APPEAL from the county court of Kent.

In August, 1894, one W. S. Fisher, as managing clerk to a firm of solicitors who acted for the plaintiff, received on behalf of the plaintiff a crossed cheque for 43*l.* 6*s.* drawn by C. C. Scott on the Bank of England and made payable to the plaintiff's order. Fisher, who had an account at the Dartford branch of the defendants' bank, forged the indorsement of the plaintiff's name, and paid the cheque so indorsed into his own account for collection. At that time Fisher's account was overdrawn to the extent of 13*l.* 9*s.* Upon receipt of the said cheque the defendants allowed Fisher to draw a cheque upon them for 5*l.* 8*s.* 6*d.*, which they cashed. Subsequently the defendants received payment of the first-mentioned cheque from the Bank of England, and placed the amount to the credit of Fisher's account. The plaintiff brought an action in the county court to recover the amount of the cheque from the defendants as money had and received to his use. The judge held that the defendants were entitled to the protection of s. 82 (1) of the Bills of Exchange Act, 1882, and entered judgment for the defendants. The plaintiff appealed.

(1) By s. 82 of the Bills of Exchange Act, 1882, "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Morton Smith, for the plaintiff. The defendants did not receive payment of the plaintiff's cheque only for their customer Fisher. His account being overdrawn at the time, they received the money for the purpose (inter alia) of liquidating the debt due from Fisher to themselves. They treated the cheque as cash. That is shewn by the fact that they allowed him to draw against it before they received payment from the Bank of England. In *Matthiessen* v. *London and County Bank* (1) Lindley J. said: "When the bank has got the proceeds, and the true owner says to the bank, 'Hand me those proceeds,' the Legislature . . . . says, 'No; if you, the bank, have collected only the proceeds of the cheque for your customer, we will not render you responsible for the proceeds when you have dealt with the cheque in the only way in which, as a matter of business, you could deal with it. If you have done anything more, if you have applied it to your own use, that is another matter.'" Here the defendants in placing the money to the credit of an overdrawn account applied it to their own use, to the extent, at all events, of 18*l.* 17*s.* 6*d.*, the amount of the overdraft and of the cheque which they allowed Fisher to draw. And in *Bissell* v. *Fox & Co.* (2) Denman J. said: "I think that the Act was intended to protect bankers only in cases where they had merely received payment of a crossed cheque for a customer, but that it was not intended to cover the case of a banker making himself the indorsee of a cheque. . . . If the banker in such a case chooses at once to treat the cheque as cash as between himself and his customer, I think that when he afterwards receives payment from the banker on whom the cheque is drawn he does so for himself and not 'for the customer' within the meaning of s. 82." There, the customer having indorsed the payee's name on certain cheques without authority and having paid them into his own account, the bankers, as in the present case, allowed him to draw against such cheques. It was held that the bankers, in subsequently receiving payment of the cheques, did not do so for their customer.

Cock, Q.C., and *Guy Lushington*, for the defendants. The

(1) (1879) 5 C. P. D. 7, at p. 16.
(2) (1885) 51 L. T. (N.S.) 663, at p. 666.

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state of the customer's account cannot affect the question whether the payment is received for him. What the banker does with the money after he has received it is wholly immaterial.

CAVE J. It seems to me quite clear that this case is within the protection of the section. Sect. 82 provides that, "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." If the banker is not to incur liability to the true owner by reason only of having received such payment, what have the defendants done more in this case that is to make them liable? It is said that they have applied a portion of the sum received in repayment of the overdraft. I cannot see why that should create any liability. The mere placing of the money to their customer's account, with the result that a portion of it would, if the balance were struck, go towards clearing off the overdraft, cannot, in my judgment, render them liable. It is a mere matter of account between them and their customer. If putting it to the customer's account is not to make the bankers liable when the customer is in funds, it cannot make them liable when the customer happens not to be in funds. The appeal must be dismissed.

LAWRANCE J. I agree.

Appeal dismissed.

Solicitors for plaintiff: *Pyke & Parrott, for J. & J. C. Hayward, Dartford.*

Solicitors for defendants: *Harries, Wilkinson & Raikes.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1897
March 16.

DUNN *v.* MACDONALD.

Principal and Agent—Liability of Agent—Warranty of Authority—Contract made by Public Servant of Crown.

The doctrine that an agent who makes a contract on behalf of his principal is liable to the other contracting party for a breach of an implied warranty of his authority to enter into the contract, is not applicable to a contract made by a public servant acting on behalf of the Crown.

Judgment of Charles J., ante, p. 401, affirmed.

APPEAL from the judgment of Charles J., ante, p. 401.

The plaintiff alleged in his statement of claim that the defendant, who was Her Majesty's Commissioner and Consul-General for the Oil Rivers Protectorate (now known as the Niger Protectorate) in Africa, had engaged him to enter his service and serve under him in the Protectorate, on the terms that he was engaged and was to serve for three years certain; and the plaintiff claimed salary and allowances as damages for wrongful dismissal before the end of the three years. Alternatively, the plaintiff alleged that the defendant untruly represented and warranted to the plaintiff that, as Her Majesty's Commissioner for the Protectorate, he was duly authorized and empowered to engage the plaintiff for the service and on behalf of Her Majesty for three years certain, whereby the plaintiff was induced to accept an engagement to serve Her Majesty, and the plaintiff claimed damages for the breach of the alleged warranty.

The defendant denied that the plaintiff entered his service, and alleged that he was in the service of Her Majesty, and further denied the alleged warranty and breach.

The plaintiff had on a previous occasion unsuccessfully brought a petition of right against the Crown in respect of the same dismissal, in which he had claimed damages on the footing of being a servant of the Crown: *Dunn* v. *Reg.* (1)

(1) [1896] 1 Q. B. 116.

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The learned judge gave judgment for the defendant. (1) The plaintiff appealed.

W. H. Stevenson, for the plaintiff. Assuming that the plaintiff became a servant of the Crown, this is not an action on the contract so entered into. The defendant acted as agent for the Crown in engaging the plaintiff, but he acted as principal when he warranted his authority to do so. The cases of *Macbeath* v. *Haldimand* (2) and *Gidley* v. *Lord Palmerston* (3) are directed to the contract into which the agent enters as an agent. There is no authority which shews that such an action as this cannot be maintained, and no question of public policy arises in the case of a person who negligently or otherwise represents that he has authority to employ another in the service of the Crown.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*) (*H. Sutton* with him), for the defendant, was not called upon.

LORD ESHER M.R. I quite agree with Charles J. on the ground on which he put his judgment, although it seems to me that the same result is arrived at on another ground. It is said that the defendant engaged the plaintiff for three years, and that he had no authority to do so, but that he warranted that he had authority. The truth is that he had that authority and exercised it, but subject to this, that although, in the name of the Crown, the defendant appointed the plaintiff for three years, the Crown could dismiss the plaintiff at any moment. Therefore the warranty that must be alleged comes to this—not that the defendant had authority to employ the plaintiff for three years, but an implied warranty that he should be kept in the employment for that time. Assuming that could be truly averred, the learned judge has held that the defendant cannot be made personally liable because what he did was done in his public character, and as a public servant of the Crown. No action lies against a public servant upon any contract which he makes in that capacity, and an action will only lie on an express personal contract. It cannot be pretended in this case that

(1) Ante, p. 401. (2) (1786) 1 T. R. 172.
(3) (1822) 3 B. & B. 275.

the defendant made any express personal contract, and there are decisions covering a hundred years or more that, under such circumstances, he cannot be made liable. The learned judge has so decided, and his decision must be upheld and the appeal dismissed.

LOPES L.J. I am at a loss to see that any breach of warranty is made out, because it appears that the defendant had authority to make this appointment. The case of the plaintiff fails on this ground, but there is a more general ground on which it also fails. The liabilities of public agents, on contracts made by them in their public capacity, are on a different footing from the liabilities of ordinary agents on their contracts. In the former case, unless there is something special which would be evidence of an intention to be personally liable, an agent acting on behalf of a government is not liable for breach of a contract made in his public capacity, even though he would by the terms of the contract be bound if it were an agency of a private nature. That is the law which has been established by a number of cases for many years past. The defendant was beyond all question a public servant, and it was in that capacity that he appointed the plaintiff. That is the short answer to the plaintiff's case, and is that given at greater length by Charles J. I entirely agree with his judgment, and think the appeal should be dismissed.

CHITTY L.J. An agent of the Crown is not personally liable on any contract entered into by him on behalf of the Crown. That immunity is well established. If we were to accept the proposition put forward on behalf of the plaintiff, the immunity would be practically abolished, because the contention is that the Crown agent is personally liable on a contract warranting his authority as agent. That a Crown agent may enter into an express contract of that kind cannot be doubted, and on such a contract he would be personally liable. The argument of the plaintiff in this case is that there was an implied contract. Now it is plain that the defendant was acting in this transaction in one character only, namely, as agent for the

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Crown. To draw from that circumstance alone an inference that he was intending personally to bind himself with reference to a warranty of his agency, seems to me to be utterly inconsistent with the facts, and the main proposition. There is no ground for saying that the defendant was acting in any other character than that of a public servant. There is no ground, therefore, for inferring that he was, in a private capacity, voluntarily entering into an implied contract warranting his authority.

Appeal dismissed.

Solicitors for plaintiff: *Dunn & Hilliard.*
Solicitor for defendant: *Solicitor to the Treasury.*

A. M.

C. A. 1897 *March* 17.

[IN THE COURT OF APPEAL.]

GOODLOCK *v.* COUSINS.

County Court—Execution—Sale of Goods claimed by Third Party—Title of Purchaser—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 156.

Where, a claim having been made to goods taken in execution by the bailiff of a county court, the claimant does not make the deposit or give the security required by s. 156 of the County Courts Act, 1888, and the bailiff sells the goods under the authority given by that section, the sale gives the purchaser a good title to the goods, although they were the property of the claimant at the time of the seizure.

APPEAL from the judgment of a Divisional Court (Wills and Wright JJ.) on an appeal from a county court. (1)

An action had been brought in the county court against the son of the present plaintiff, and judgment was recovered and execution issued against him. The county court bailiff seized certain goods at the son's house, amongst them being a horse, which was claimed in writing by the plaintiff as required by Order XXVII., r. 1, of the County Court Rules. The high bailiff duly sent to the execution creditor notice of the claim under Order XXVII., r. 1, and to the plaintiff a notice under Order XXVII.,

(1) Ante, p. 348.

r. 1 (*a*), requiring him to make a deposit or give security in accordance with s. 156 of the County Courts Act, 1888 (1), but the plaintiff failed to comply with the notice. The bailiff then sold the horse by auction. It was bought and paid for by the defendant, and the proceeds of the sale were duly paid into court by the bailiff. Subsequently to the sale the execution creditor admitted the plaintiff's title to the horse. The plaintiff then brought the present action against the defendant in the county court to recover damages for the wrongful conversion of the horse. The county court judge found that the horse at the time of the seizure was the property of the plaintiff, but that the defendant, when he bought it, had no notice that it was the plaintiff's property. He gave judgment for the plaintiff on the ground that the sale by the bailiff gave the defendant no title to the goods. The defendant appealed, and the Divisional Court allowed the appeal.

Cranstoun, for the plaintiff. Sect. 156 of the County Courts Act, 1888, was intended for the protection of the bailiff. It was not intended to bar the title of the claimant to the goods. The construction of the section contended for by the defendant would inflict great hardship on the owner of goods wrongfully seized. He may not through poverty be able to make the deposit or give the security mentioned in the section, and the proceeds of a forced sale under an execution would not recompense him for the loss of his goods. The section does not alter the capacity in which the bailiff sells the goods: *Heathcote* v. *Livesley*. (2) The section says that the bailiff is to sell "as if no such claim had been made"; that is to say under the warrant of execution. The warrant only authorizes seizure and sale of the execution debtor's goods. Where no claim is made, and the bailiff sells under the warrant goods which are not the execution debtor's, the purchaser gets no title to the goods: *Farrant* v. *Thompson*. (3) This is not like a case in which goods are sold under an order of the Court. The bailiff was not bound to sell the goods, but might have delayed the sale under Order XXVII., r. 6,

(1) See section set out ante, p. 348. (2) (1887) 19 Q. B. D. 285.
(3) (1822) 2 D. & R. 1.

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of the County Court Rules. In the case of *Hills* v. *Renny* (1) the point involved in this case was expressly left open by the Court. The bailiff in selling under the section must be taken to sell only such interest as the execution debtor may have in the goods: *Morley* v. *Attenborough*. (2)

Stroud, for the defendant. The scope of the section clearly is to substitute the money paid into court as the proceeds of the sale for the goods themselves. What in such a case as this, according to the plaintiff's construction of the section, is to become of that money? The purchaser cannot recover it, for by s. 157 of the County Courts Act, 1888, which enables the county court judge to adjudicate upon the claim and to award damages if he thinks fit to the claimant, no provision is made by which the purchaser can be made a party to the proceedings or obtain any redress.

[He was stopped by the Court.]

Cranstoun, in reply. The county court judge would have power to direct that the money should be paid out to the purchaser by virtue of his inherent jurisdiction to deal with money paid into his own court.

LORD ESHER M.R. The question in this case depends upon the construction of s. 156 of the County Courts Act, 1888. It is admitted that all the circumstances existed which were necessary to render that section applicable. It appears to me that the effect of the section is that, in cases to which it applies, the bailiff is absolutely commanded to sell the goods and pay the proceeds of the sale into court; and then the right to them is to be determined by the decision of the judge. I think that it is a necessary implication from those provisions that the purchaser to whom the goods are sold is to be entitled to the goods sold in pursuance of the section. It follows that the decision of the Divisional Court was correct and must be affirmed.

LOPES L.J. I am of the same opinion. The question is whether, if the conditions mentioned in s. 156 are fulfilled,

(1) (1880) 5 Ex. D. 313. (2) (1849) 3 Ex. 500.

the sale by the bailiff under that section confers a title on the purchaser. In the present case every requirement of the section was satisfied. I come to the conclusion that the bailiff is empowered under the section to confer a title on the purchaser. The claimant has an opportunity of preventing a sale under the section by making a deposit with the bailiff, which is to be paid into court by him to abide the decision of the judge upon the claim, or by giving security as mentioned in the section. If he fails to do so, and the goods are sold, the proceeds of the sale are to be paid into court to abide the decision of the judge. I think the necessary implication from these provisions is that the Legislature intended that a title should be conferred on the purchaser. What would his position be if we held otherwise? He knows nothing of what has gone before the sale; he pays the money which is paid into court to abide the decision of the judge; and he has no means that I can see of getting it back again. Having regard to the terms of the section, the conclusion appears to me to be irresistible that the Legislature meant that a title should be given to the purchaser from the bailiff. On these grounds I think the appeal should be dismissed.

CHITTY L.J. I agree that the appeal should be dismissed. The question turns upon the construction of s. 156. The argument for the plaintiff is in effect that all that the bailiff is required by the section to sell is the interest of the execution debtor in the goods. In this case all the circumstances mentioned in s. 156 down to the failure of the claimant to make a deposit or give security as required by the section existed. Thereupon the section says that the bailiff shall sell "such goods." It does not say that he shall sell only the execution debtor's interest in the goods, but that he shall sell the goods themselves. Reliance was placed upon the words "as if no such claim had been made"; but I do not think they were intended to have the effect attributed to them by the plaintiff's counsel. We are not concerned, I think, to decide whether a sale under the section gives the purchaser a title to the goods as against all the world. It is sufficient for the purposes of

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this case to say that it gives him a good title as against the claimant. The section means, I think, just what it says, namely, that the bailiff shall sell the goods as if no claim had been made by the claimant; and thereupon the proceeds of the sale are to be paid into court to abide the decision of the judge. It would seem a strange conclusion that the purchaser whose purchase-money has been paid into court for the purpose of its abiding the decision of the judge with regard to the claim should get no title to the goods as against the claimant.

Appeal dismissed.

Solicitors for plaintiff: *Peacock & Goddard, for Lamb, Cheltenham.*

Solicitors for defendant: *W. H. Martin & Co., for Heath, Cheltenham.*

E. L.

C. A. 1897 *March* 19.

[IN THE COURT OF APPEAL.]

DODD *v.* CHURTON.

Building Contract—Liquidated Damages—Penalties for Delay—Extras.

Where in a contract for the execution of specified works it is provided that the works shall be completed by a certain day, and, in default of such completion, the contractor shall be liable to pay liquidated damages, and there is also a provision that other work may be ordered by way of addition to the contract, and additional work is ordered which necessarily delays the completion of the works, the contractor is exonerated from liability to pay the liquidated damages, unless by the terms of the contract he has agreed that, whatever additional work may be ordered, he will nevertheless complete the works within the time originally limited.

Westwood v. *Secretary of State for India*, (1863) 11 W. R. 261; 7 L. T. 736, followed.

Jones v. *St. John's College*, (1870) L. R. 6 Q. B. 115, distinguished.

APPEAL from the judgment of a Divisional Court (Wills and Wright JJ.) on an appeal from the county court of Shropshire.

The action was to recover the balance due to the plaintiff, a builder, upon a building contract. The defendant counter-claimed the sum of 50*l.* as liquidated damages for non-comple-

tion of the works contracted for within the time specified in the contract. The claim was admitted, and the only question was as to the counter-claim.

The plaintiff had entered into a contract with the defendant by which, in consideration of the sum of 664*l.* to be paid to the plaintiff by the defendant in the manner provided by the specification and general conditions annexed to the contract, the plaintiff agreed to well and properly execute and complete the whole of certain building works in manner described and set forth in the said specification and drawings therein referred to, and to execute the same, with all the works and appurtenances thereto belonging, in the manner, upon the terms and conditions, and subject to all the regulations and stipulations contained in the said specification and general conditions. By the general conditions referred to, it was provided (inter alia) as follows: (1.) The whole of the works and any other works that may be ordered as additions to this contract are to be executed and completed in the best and most workmanlike manner and with the best materials of their several kinds, and everything to be done to the full spirit and intent of this contract, which is intended to comprise everything necessary to the perfect completion of the works. (2.) Every part of the works to be done to the satisfaction of the architects, and their directions to be followed in every respect, and their opinion on all questions relating to the works or contract to be final and conclusive. (4.) Any authority given by the architects for any alteration or addition in or to the works is not to vitiate the contract, but all additions, omissions, or variations made in carrying out the works for which a price may not have been previously agreed upon are to be measured and valued and certified for by the architects and added to or deducted from the amount of the contract, as the case may be, according to the detailed schedule of prices on which the contract was formed. The schedule of prices to apply to all deductions and to all additions up to 15 per cent. above the amount of the contract, any additional work beyond 15 per cent. above the amount of the contract, and any item to which the schedule of prices does not apply, to be allowed for at such

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prices as the architects may consider fair and reasonable. (24.) The building to be ready for the roof-timbers by May 1, 1892, and the whole of the works to be completed by June 1, 1892, under a penalty of 2*l.* per week for every week that any part of the works remains unfinished after that date as liquidated damages.

Additional works to the amount of 22*l.* 8*s.* 8*d.* were ordered under condition 4, which necessarily involved a delay in the completion of the works until after the specified date. The works were not completed until December 5, 1892. Evidence was given on the part of the defendant to the effect that a fortnight was a reasonable time for the doing of the additional work, and the defendant, allowing a fortnight's additional time for the completion of the works, claimed, under condition 24, 2*l.* per week in respect of a delay of twenty-five weeks as liquidated damages.

The county court judge held that by giving the order for the additional works the defendant had waived the stipulation for penalties in respect of non-completion of the work by June 1, and gave judgment for the plaintiff on the claim and counter-claim.

On appeal to the Divisional Court the learned judges differed in opinion, Wills J. thinking that the judgment of the county court judge was right, but Wright J. being of the opposite opinion. The judgment in the county court therefore stood.

E. Honoratus Lloyd, for the defendant. The provision that an order for extras shall not vitiate the contract means that notwithstanding such an order the contract, i.e., the whole contract, including the stipulation for completion of the works by June 1, shall stand. The true construction of this contract therefore is that the builder undertakes to do the original work and any extras that may be ordered by that date. The case consequently falls within the decision in *Jones* v. *St. John's College*. (1) The cases which will be relied on for the plaintiff are distinguishable. In *Holme* v. *Guppy* (2) there was no provision in the contract binding the contractors to do extra work.

(1) L. R. 6 Q. B. 115. (2) (1838) 3 M. & W. 387.

In *Westwood* v. *Secretary of State for India* (1) and *Russell* v. *Bandeira* (2), though there was a provision for extras, there was no agreement as in *Jones* v. *St. John's College* (3) that, if extras were ordered, nevertheless the whole work should be completed within the time specified for the completion of the original work. [He also cited *Thornhill* v. *Neats* (4); *Legge* v. *Harlock* (5); *Roberts* v. *Bury Commissioners*. (6)]

Lochnis, for the plaintiff. There is no agreement in this case such as was alleged and admitted by the demurrer in *Jones* v. *St. John's College* (3), namely, to complete the whole work, including the extras, within the time originally specified. The provision that the ordering of extras is not to vitiate the contract is merely inserted to negative any possibility of a subsequent suggestion that the alteration of the work by ordering extras amounted to a rescission of the original contract altogether, and that the work was done upon a quantum meruit. The case comes within the authority of the class of cases, of which *Westwood* v. *Secretary of State for India* (1) is an example, where, though the builder has agreed to execute such extra work as may be ordered, there is no agreement that, whatever extras are ordered, he will nevertheless execute the work within the time originally specified. The case is therefore within the general rule by which, if the building owner by ordering extras has prevented the performance of the work by the specified date, he has deprived himself of the right to claim the penalties provided for non-completion by that date.

E. H. Lloyd, in reply.

LORD ESHER M.R. The question in this case is whether the defendant, the building owner, is entitled to recover from the plaintiff, the builder, the amount of 2*l.* per week as liquidated damages for breach of the contract to complete certain works within the stipulated time. The point upon which this question depends is whether the building owner has or has not disentitled himself to claim the penalties mentioned in clause 24

(1) 11 W. R. 261; 7 L. T. 736.
(2) (1862) 13 C. B. (N.S.) 149.
(3) L. R. 6 Q. B. 115.
(4) (1860) 8 C. B. (N.S.) 831.
(5) (1848) 12 Q. B. 1015.
(6) (1870) L. R. 5 C. P. 310.

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of the contract by reason of his having ordered extra work beyond the original work described in the specification. The contract provided for the performance by a certain date of works described in a specification in consideration of the payment of a fixed sum as the price of the works specified. It is admitted that extra work was ordered, and that the necessary result of the builder's having to do that work was that it took him more time to complete the works than if he had only had to do the work originally specified. It was, no doubt, part of the original contract that the building owner should have a right to call upon the builder to do that extra work, and, if he did give an order for it, the builder could not refuse to do it. The principle is laid down in Comyns' Digest, Condition L (6.), that, where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and, accordingly, a well recognised rule has been established in cases of this kind, beginning with *Holme* v. *Guppy* (1), to the effect that, if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided for by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed on the contractor. Then this further complication arose. Contracts were entered into by which the builder agreed to do any extra work which the building owner or his architect might order. It was urged in such cases, as, for instance, in *Westwood* v. *Secretary of State for India* (2), that the fact that the builder had contracted to do any extra work that might be ordered prevented the application of the rule which I have mentioned. But it was held that that was not so. Then there came another case which was said to be an exception from the rule, namely, that which existed in *Jones* v. *St. John's College*. (3) There it was alleged on the pleadings that there was an agreement by which the builder agreed that, if any extra work was ordered, then, whatever that work might be, he would undertake nevertheless

(1) 3 M. & W. 387. (2) 11 W. R. 261; 7 L. T. 736.
(3) L. R. 6 Q. B. 115.

to complete the works within the time originally specified by the contract; and it was thereupon held that, if the builder was foolish enough to make such an agreement, he was bound by it and must take the consequences. The whole question here is whether on the construction of this contract, by which undoubtedly the builder has undertaken to perform any extra work that may be ordered, he has agreed to take upon himself the burden which the builder had taken upon himself in *Jones* v. *St. John's College* (1); in which case, however foolish and unreasonable such an agreement may be, he must stand by it. One rule of construction with regard to contracts is that, where the terms of a contract are ambiguous, and one construction would lead to an unreasonable result, the Court will be unwilling to adopt that construction. In *Jones* v. *St. John's College* (1) the Court had no opportunity of construing the contract really made. The demurrer admitted the statement on the pleadings that the builder had entered into the unreasonable agreement alleged. I cannot construe the contract in this case as containing such an agreement by the builder. I think the words in the contract relied upon by the defendant are capable of another construction which would be perfectly reasonable. It seems to me therefore that the case is not brought within the authority of *Jones* v. *St. John's College* (1), but falls within the class of cases, of which *Westwood* v. *Secretary of State for India* (2) is an example, where it has been held that, although the building owner was entitled to give orders for extras, if, by so doing, he has rendered it impossible to complete the work by the specified date, he has deprived himself of the right to claim the liquidated damages mentioned in the contract. For these reasons I think the appeal must be dismissed.

LOPES L.J. I have very little to add. It is a well-ascertained rule of law that, where the failure of a contractor to complete the work by the specified day has been brought about by the act of the other party to the contract, he is exonerated from the performance of the contract by that date, which has been thus rendered impossible. That rule appears to me to be

(1) L. R. 6 Q. B. 115. (2) 11 W. R. 261; 7 L. T. 736.

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applicable to the present case. It has been often laid down that, where there is a provision that a contractor shall pay penalties for delay as in the present case, no penalty can be recovered where delay has been occasioned by the act of the person endeavouring to enforce the penalties. It was argued that this case was taken out of that rule by the clause in the contract which empowers the architects to order extras and provides that such an order is not to vitiate the contract; and that that clause brought the case within the decision in *Jones* v. *St. John's College*. (1) In my opinion that is not so. I do not think the clause bears the construction which the defendant seeks to put upon it. For these reasons I think the appeal should be dismissed.

CHITTY L.J. I am of the same opinion. The case really depends upon the construction of the contract between the parties. The law on the subject is well settled. The case of *Holme* v. *Guppy* (2) and the subsequent cases in which that decision has been followed are merely examples of the well-known principle stated in Comyns' Digest, Condition L (6.), that, where performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from performance of it. The law on the subject was very neatly put by Byles J. in *Russell* v. *Bandeira*. (3) This principle is applicable not to building contracts only, but to all contracts. If a man agrees to do something by a particular day or in default to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time. Of course a man may make such a contract as was alleged in *Jones* v. *St. John's College*. (1) He may contract to do the specified works and any extra work which may be ordered within a certain time. In that case a contract to that effect was admitted by the demurrer, and therefore there was no opportunity for the application of the rule of law which I have mentioned. I can find nothing in the

(1) L. R. 6 Q. B. 115. (2) 3 M. & W. 387.
(3) 13 C. B. (N.S.) 149.

contract in this case to justify the Court in saying that it was a contract of the same nature as was admitted in *Jones* v. *St. John's College*. (1) The provision of the contract principally relied upon by the defendant was that by which it is stated that any authority given by the architects for any alterations or additions in or to the works is not to vitiate the contract. I do not think that this provision, however interpreted, reaches the length contended for by the defendant. I do not think it amounts to a contract to do all the works including any extras that may be ordered within the time specified for the performance of the original work. The clause appears to me to be capable of another and a more reasonable construction. I think that such a construction as is contended for ought not to be put on an ambiguous clause like this, and that it would require very clear language to shew that a man had undertaken a responsibility which very few men would undertake with their eyes open. The provision is that the contract is not to be vitiated, i.e., that it is to stand, but that does not exclude the application of the principle stated in Comyns' Digest to which I have referred.

Appeal dismissed.

Solicitors for plaintiff: *Rowcliffes, Rawle & Co., for A. E. Whittingham, Nantwich.*

Solicitors for defendant: *Cunliffes & Davenport, for Churton, Chester.*

(1) L. R. 6 Q. B. 115.

E. L.

1897
Feb. 1, 2, 3, 17.

[IN THE COMMERCIAL COURT.]

THE BRANCKELOW STEAMSHIP COMPANY *v.* LAMPORT & HOLT.

Ship—Charterparty—Delay in Loading—"Weather-working Days"—Mode of Computation—Demurrage.

A charterparty provided that cargo should be loaded at a certain rate per weather-working day. On certain days owing to bad weather cargo could only be loaded for a few hours:—

Held, that the time so occupied in loading cargo was not to be reckoned against the charterers as a whole, but as a part only, of a weather-working day.

Where work is stopped by bad weather, but a substantial quantity of work is done, though not amounting to half a day, it is to be reckoned as half a day; where substantially more than half a day's work is done, though not amounting to a whole day, it is to be counted as a whole day; no smaller fraction than half a day should be taken into the calculation.

ACTION tried by the Lord Chief Justice without a jury in the Commercial Court.

The action was brought to recover five days' demurrage under the following circumstances. The plaintiffs were the owners of the steamer *Highfield*, which was chartered by the defendants by a charter or "fixing note," in the form of a letter, dated December 3, 1895; the following are its material terms: "To load not exceeding 2300 tons wheat $\frac{\text{and}}{\text{or}}$ maize at Rosario or at a port below, completing at Buenos Ayres $\frac{\text{and}}{\text{or}}$ La Plata with cargo and live stock" to certain ports in the United Kingdom or Continent. "The steamer is to be loaded at the rate of 175 tons per weather-working day, Sundays and holidays excepted. . . . Other usual terms of River Plate charter." The *Highfield* arrived at Rosario on March 8, 1896, and remained there loading a portion of her grain cargo until March 19, when she went down the river to La Plata, where she completed the loading of her grain cargo, and also took cattle and sheep on board, the loading being completed on March 31; the plaintiffs claimed that it should have been completed on March 26. While at Rosario the loading of the grain

cargo was on several days interfered with by rain, which on no occasion stopped work for a whole day, but prevented operations being carried on for some hours in the morning or afternoon, as the case might be. For instance, on March 10 it was impossible owing to heavy gusts of wind and rain to load cargo during the morning; but later in the day the weather improved, and from 1 to 5.30 P.M. a considerable quantity of cargo was loaded. The plaintiffs contended that in such a case, a substantial quantity of work having been done, the day was to be treated as a whole weather-working day; that on that computation the days allowed for loading expired on March 25, and (one of the subsequent days being a Sunday, on which no work was done) the plaintiffs claimed five days' demurrage. The defendants contended that March 10 and similar days should only count as a portion of a day; that they were entitled to seventeen days for loading, and that this time had not been exceeded.

Other points were raised during the argument, to which it is not necessary here to refer, this report being confined to the question of the proper mode of computing weather-working days.

Joseph Walton, Q.C., and *Lewis Noad*, for the plaintiffs. There is no authority as to the proper interpretation of the expression "weather-working day." Where, however, the word "day" is used in a charter, the rule is that a part of a day is to be counted as a whole day, if substantial work has been done in loading or discharging a vessel during the part of the day actually used: *Commercial Steamship Co.* v. *Boulton* (1); *The Katy*. (2) And in Scotland a similar rule prevails, that fractions of lay-days are to be counted as entire days: *Hough* v. *Athya*. (3)

Pickford, Q.C., and *Carver*, for the defendants. Where weather-working days are being dealt with, the only reasonable plan is to count a fraction of a day as a fraction only, and not as a whole day. If a fraction of a day is to be counted as a

(1) (1875) L. R. 10 Q. B. 346. (2) [1895] P. 56.
(3) (1879) 16 Sc. L. R. 553.

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whole day, a charterer might refuse to load on a day which began with rain, and this would be detrimental to both parties. The cases cited are not applicable to weather-working days.

Cur. adv. vult.

Feb. 17. LORD RUSSELL of KILLOWEN C.J. A question of general importance arose during the argument of this case, and was indeed the question to which the arguments of counsel were mainly directed; it is whether, when a part only of a weather-working day is in fact used by the charterers, that part is to be counted against them as a whole day or as part of a day, or whether it is to be excluded from the calculation altogether. The decision of that question requires an examination of the facts of the case. [After stating his reasons for holding that the loading days commenced on March 9, his Lordship continued:—]

On Tuesday, March 10, the day began with heavy rain, and the captain did not suggest in his evidence that there was not ample reason for the charterers' men declining to work; the morning was not a weather-working day. The weather, however, cleared up later, and in the afternoon from 1 to 5.30 a considerable quantity of cargo was loaded. Strange to say, the question of how this day is to be reckoned is not governed by authority.

It is suggested by the plaintiffs that when any substantial amount of work is done upon a particular day the ship is entitled to reckon that as a whole weather-working day. I hope I am not contradicting any authority when I say that I consider that contention to be absurd. The charterparty provides that the charterers are to have so many weather-working days: suppose a particular day to begin with fine weather and that two or three hours' work is done; then the weather changes, and a state of things arises in which it would be unreasonable for the charterers' men to work at all: are the charterers to be charged with two or three hours' work as a whole day? I think that such a view is unreasonable and inequitable, and in the absence of any binding authority in its

favour I decline to assent to it. There might be many days on which work was begun in the morning but stopped in a short time because of rain, and, if effect were given to the plaintiffs' contention, the charterer might not in a given case have half the number of days for loading to which he was entitled under the charter. It would be more equitable to reject the portion of a day from the calculation altogether, for the ship would gain something in the way of despatch by reason of the work done. I think, however, that the most equitable view is to charge half a day against the charterers where substantial work is done, though not amounting to half a day, and to charge a full day against them where substantially a full day's work, though not amounting to twelve hours, is done; no smaller fraction than half a day should, however, be taken into consideration, and if the time worked is quite insignificant it should not be charged at all. The Courts appear in some cases to have inferred an agreement between the parties to treat any work done as a whole day's work, but I do not think that any agreement should be inferred beyond an agreement to treat the question in accordance with the facts. I think, therefore, that March 10 should be charged as half a day against the charterers. [The learned judge then went in detail through the facts as to each day down to March 31.] The result of this calculation is that the charterers took seventeen and a half weather-working days to load this ship, exceeding their limit of seventeen days by half a day; but after the loading days are exhausted every part of a day counts as a whole day's demurrage, and there will therefore be judgment for the plaintiffs for one day's demurrage, 43*l.* 7*s.* 4*d.*, with costs on the county court scale.

Judgment for plaintiffs.

Solicitors for plaintiffs: *W. A. Crump & Son.*

Solicitors for defendants: *Field, Roscoe & Co., for Thornely & Cameron, Liverpool.*

W. J. B.

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Feb. 26.

RICHARDS *v.* THE QUEEN.

Criminal Law—Practice—Writ of Error—Dispensing with Attendance of Plaintiff in Error in Cases of Felony.

Where a person convicted of felony alleges error upon the record, the Court may, if the plaintiff in error be in custody, dispense with his attendance in court upon the argument of the writ of error.

WRIT OF ERROR.

The plaintiff in error had been convicted of felony at the assizes for the county of Glamorgan, and was in custody.

B. F. Williams, Q.C. (*Ivor Bowen* with him), for the plaintiff in error, moved to dispense with his attendance in court upon the argument of the writ. Formerly it was necessary for a plaintiff in error in cases of felony to appear in person to assign errors, but that can now be done under Crown Office Rule 187 by his solicitor, and even before that rule personal attendance could under special circumstances be dispensed with, as where the plaintiff in error was in Australia: *Murray* v. *Reg.* (1) The Crown Office Rules are silent as to his presence in court at the argument, and there is no more necessity for his personal attendance then than there is for his personal attendance to assign errors.

H. Sutton, for the Crown.

CAVE J. It is true that the general rule is that in cases of felony the plaintiff in error must be present in court upon the argument of the writ, in order to make sure that he shall undergo his sentence in the event of judgment being given for the Crown. But in the present case he is in custody; and that consideration therefore does not apply. There is no real necessity for his presence at the argument. I think therefore that, although there is no Crown Office rule which in terms

(1) (1845) 3 D. & L. 100; 7 Q. B. 700.

authorizes us to do so, we may make an order dispensing with his attendance.

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RICHARDS v. THE QUEEN.

WILLS J. concurred.

Order accordingly.

Solicitor for plaintiff in error: *J. T. Lewis.*
Solicitor for the Crown: *Solicitor to the Treasury.*

W. J. B.

DUNCAN *v.* DOWDING.

1897
March 15.

Licensing Acts—Power of Constable to enter on Licensed Premises—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 16.

By s. 16 of the Licensing Act, 1874, "Any constable may, for the purpose of preventing or detecting the violation of any of the provisions of the principal Act or this Act which it is his duty to enforce, at all times enter on any licensed premises":—

Held, that a constable cannot under the above section demand admission to the licensed premises unless he has reasonable ground for suspecting that some violation of the said Acts is taking place or is about to take place thereon.

CASE stated by the recorder of Bristol.

On May 20, 1896, the appellant, who was the occupier of a fully licensed public-house known as The Brandy Cask, situate in Bond Street, Bristol, was convicted before the justices in petty sessions of having refused or failed to admit to a certain room in the said licensed premises the respondent, a police-constable demanding to enter the same in the execution of his duty, contrary to the provisions of s. 16 of the Licensing Act, 1874. The appellant appealed to the quarter sessions, when the following facts were proved. On April 23, 1896, at 10.30 P.M., the respondent while on duty in Bond Street heard the sounds of music and singing coming from the said licensed premises. He thereupon entered the premises, passed through the bar, and went upstairs to a room from which the sounds of music proceeded. The room, which was part of the licensed premises, was then in the occupation of a lodge or branch of a society known as the Royal Antediluvian Order of Buffaloes,

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having been let by the appellant to the said lodge for the exclusive occupation by them on every Thursday evening at a rent of 13*s.* a quarter, and the lodge was then conducting its business therein. While such business was being transacted intoxicating liquors were supplied by the appellant to the members, but no one was permitted to enter the room except members, and they only upon giving a password and sign. It is the duty of a person called the "tiler" to refuse admission to any person unable to give the sign. The respondent knocked at the door of the room, but was refused admission. He thereupon informed the appellant that he desired to visit the room; but the appellant told him that it was in the occupation of a secret society, and that he was unable to let him in. The appellant made no effort to let the respondent into the room. The respondent visited the licensed premises and demanded admission to the room for the purpose of preventing and detecting the violation (if any) of the provisions of the Licensing Acts, 1872 and 1874, which it was his duty to enforce. For the appellant it was contended that the room in question was not a part of the "licensed premises" within the meaning of s. 16; and that, the room being let for private purposes, and not being under the control of the appellant at the time of the demand for admission by the respondent, the appellant's conduct did not amount to a refusal or failure to admit the respondent within the meaning of the section. The recorder overruled the appellant's contentions and affirmed the conviction subject to a case for the opinion of the Court.

Candy, Q.C., and *Maddison*, for the appellant. A comparison of the language of s. 16 of the Act of 1874 with that of s. 7 of the Wine and Beerhouse Act, 1834 (4 & 5 Will. 4, c. 85), shews what is the true construction of the former section. Sect. 7 of the earlier Act provided that "it shall be lawful for all constables . . . . to enter into all houses . . . . licensed to sell beer or spirituous liquors to be consumed on the premises when and so often as such constables . . . . shall think proper." Under that section a constable might justify entering any part of the licensed premises at any hour of the day or night with-

out assigning any reason for so doing. That was thought unreasonable, and the section was accordingly repealed by the Act of 1874, and s. 16 of that Act was substituted for it. Under this latter section the constable can only enter for the purpose of preventing or detecting violations of the provisions of the Act. It must be taken to be intended that before he can enter for that purpose he must have some reasonable ground for supposing that there is such a violation taking or about to take place. The particular violations which it is suggested on the other side that the respondent had in view were the offences, on the part of the guests, of being drunk on the licensed premises, and on the part of the appellant of permitting drunkenness thereon, which are respectively prohibited by ss. 12, 13 of the principal Act. But he had no sufficient reason to suspect that those offences were being committed. All he heard was the sound of music and singing; but that is not enough to raise a presumption of drunkenness. Further, in any case the appellant cannot be convicted merely because the "tiler," who was not his servant, refused the respondent admission to the room.

B. R. Vachell, for the respondent. It is not necessary that the constable should either give or have any special reasons for demanding admission to any closed portion of the licensed premises. It is enough that he does so with the bonâ fide intention of preventing violations of the Act: *Reg.* v. *Dobbins*. (1) But if the constable was entitled to be admitted, the appellant was rightly convicted; he was bound to force open the door, if that course was necessary, to enable admission to be gained.

CAVE J. This case raises a question which, in my opinion, it is not necessary to decide. The section under which the constable claimed to be entitled to enter the room provides that "any constable may, for the purpose of preventing or detecting the violation of any of the provisions of the principal Act or this Act which it is his duty to enforce, at all times enter on any licensed premises." That, no doubt, gives him the power

(1) (1884) 48 J. P. 182.

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to enter for that purpose. But, before the occasion for the exercise of that power can arise, he must have reasonable ground for suspecting that circumstances exist, or are about to exist, constituting a violation of some provision of the Acts. The particular violation which it was here suggested that he was desirous of preventing or detecting was that of excessive drinking. But there was nothing which could reasonably lead him to suspect that the members of the lodge were drinking to excess. It would be monstrous to suggest that the mere fact that persons are singing and playing in a room in licensed premises points to the inference that they are getting drunk. If it had been shewn that on previous occasions members of the lodge had been seen to leave the room in a condition of intoxication, that would have been another matter; but there was nothing of that kind here. The recorder seems to have thought that it was enough for the constable to say that he wanted to enter the room for the purpose of enforcing the law. I cannot agree. Interference, even with licensed premises, cannot be justified without some reasonable ground. If there had been reasonable ground here for suspecting that excessive drinking was taking place, a further question would have arisen as to whether the licensed person could be convicted because the occupiers of the private room, over whom he had no control, refused to admit the constable. It is not necessary to decide that question, though I may say that on that point I should have been very loth to reverse the recorder's decision. Our decision must not be taken to give colour to the notion that persons may drink to excess with impunity in a private room of an inn.

LAWRANCE J. I am of the same opinion.

Appeal allowed.

Solicitor for appellant: *J. Morley, for Bailey, Bristol.*
Solicitor for respondent: *D. T. Burgess, Bristol.*

J. F. C.

HAWKE, Appellant *v.* DUNN, Respondent.

1896
Dec. 18, 19.
1897
March 13.

Gaming—Place used for Betting—Inclosure on Racecourse—Betting by Bookmaker in various Parts of Inclosure—"Betting with Persons resorting thereto"—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The respondent, a professional bookmaker, was charged with unlawfully using a certain place, to wit an inclosure situated upon a racecourse, for the purpose of betting with persons resorting thereto on contingencies relating to horse-races.

The inclosure was contained within the racecourse, which was itself inclosed. Admittance was obtained by payment—to the racecourse of 1*s.*, to the inclosure of 1*l.* At a race-meeting the respondent, accompanied by his clerk, was admitted within the inclosure, where he shouted the odds against the horses about to run, inviting persons to bet with him. The backer in each case was required to pay the money for which he backed the horse to the respondent, and received a ticket bearing the names of the respondent and the horse, and the odds laid. If the horse won the respondent repaid to the backer his stake, and paid him the odds. The respondent did not confine himself to any fixed spot in the inclosure, and had no apparatus to denote the spot where he carried on his operations, but moved about and made bets in various parts. He had no control over the management of the inclosure.

On a case stated by justices:—

Held, that the inclosure was a "place," and was used for the purpose of the respondent "betting with persons resorting thereto," within the meaning of the Betting Act, 1853, s. 1, and therefore the respondent was liable to be convicted under s. 3.

Case stated by justices.

An information was preferred by the appellant, under 16 & 17 Vict. c. 119, s. 3, against the respondent, for that he, on July 4, 1896, did unlawfully use a certain place, to wit an inclosure known as the 1*l.* or Tattersall's Ring, situate upon the Hurst Park Racecourse in the parish of West Moulsey, in the county of Surrey, for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to horse-races.

The facts which were proved at the hearing before the justices, and were set out in the special case, are fully stated in the judgment of the Court.

The justices dismissed the information.

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The question for the opinion of the Court was, whether the justices came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

1896. Dec. 18, 19. *Asquith, Q.C.* (*Reginald Brown* with him), for the appellant. The justices were wrong in refusing to convict. The offence mentioned and described in the information was fully proved at the hearing to have been committed. It is clear on the evidence that the appellant used a place—that is, "The *11.* Inclosure," otherwise "Tattersall's Ring," for the purpose of betting with persons resorting thereto, within the meaning of the Betting Act, 1853 (1) (16 & 17 Vict. c. 119), s. 1. The mere fact that the bookmaker does not confine himself to any fixed spot in the ring, or does not use any apparatus, such as a stool, a desk, or a fixed umbrella, cannot prevent his operations from amounting to a user of the ring for the forbidden purpose. The words of the Act cannot be confined to structures of the same nature as a house, office, or room. Here the "place" is the inclosure. It is a defined space, to which any one can resort who chooses to pay the charge for entrance, and a person using that place, or any part of it, for the purpose of betting with persons so resorting to it, commits an offence against the Act. There is a definite inclosed space, to which a professional bookmaker goes for the express purpose of inviting those of the public who resort thither to bet with him on races. Nothing could be more clearly within both the words and the mischief of the Act.

Bigham, Q.C. (*Stutfield* with him), for the respondent. The decision of the justices was right. No offence was committed by the respondent, within the meaning of the statute, for the inclosure referred to in the case cannot fairly be described as a "house, office, room, or other place," within the meaning of ss. 1 and 3. The doctrine as to ejusdem generis is applicable. The Act is penal, and ought not to be extended beyond what it clearly was intended to cover. It is entitled "An Act for the Suppression of Betting-Houses," and the preamble referred to betting-houses or offices. This shews that the kind of betting

(1) So entitled by the Short Titles Act, 1896 (59 & 60 Vict. c. 14), s. 1.

which took place in the present case was not that kind of betting which the Act was intended to prevent. This view is supported by the provisions of s. 12, giving power to the police to enter and search any "house, office, room, or place" suspected of being used contrary to the Act. Such a provision as this can have no application to an inclosure such as is described in the present case.

[The authorities which were cited in argument are fully dealt with and commented on in the judgment.]

Asquith, Q.C., replied.

Cur. adv. vult.

1897. March 13. HAWKINS J. I have the authority of all the learned Judges who sat with me, and heard the argument in this case (Cave, Wills, Wright, and Kennedy JJ.) for stating that they concur in the judgment which I am about to read. [The learned Judge then read the following judgment:—]

An information preferred by John Hawke (the appellant) against Richard Dunn (the respondent), charging that the respondent on July 4, 1896, unlawfully used a certain place, to wit an inclosure known as "The 1*l.* Inclosure," or "Tattersall's Ring," situated upon the Hurst Park Racecourse, for the purpose of betting with persons resorting thereto, upon certain contingencies relating to horse-races, contrary to the statute 16 & 17 Vict. c. 119, s. 3, came on for hearing by a bench of magistrates at Kingston-on-Thames on July 23 last, when they dismissed it; but on the application of the appellant stated this case for the opinion of the Court.

The material facts are as follows:—

The respondent is a bookmaker and professional bettingman.

The Hurst Park Club (a limited company) is the owner of many acres of land on Moulsey Hurst, Surrey, inclosed by a tall fence with gates at different points for ingress and egress.

Within this inclosure the company has for some years past held a series of meetings for horse-races, and upon the ground comprised within it a racecourse with the usual accessories has been formed, and admittance to the interior of this—which I

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will call the main inclosure—is obtained on payment of one shilling for each person. Within this inclosure are three stands, each with a smaller inclosure attached to and communicating with it; the charges for entry to these stands respectively are 1*l.*, 10*s.*, and 2*s.* 6*d.* All the entrance-moneys are received by the company.

The 1*l.* stand, generally known as "Tattersall's Ring," is roofed over, and contains rows of seats rising from the ground in tiers; the inclosure attached is about forty yards long and thirty yards wide, and is bounded on one side by the stand and on the remaining sides by an open iron fence about breast-high. Adjoining thereto are the 10*s.* and the 2*s.* 6*d.* stands, and inclosures, similarly constructed and fenced.

At a race-meeting held on the day named in the information many thousand persons were admitted to the main inclosure.

Of these, about one thousand, including the respondent, and fourteen other bookmakers—each accompanied by his clerk—were admitted within "Tattersall's Ring." Each of these bookmakers shouted out the odds against the different horses about to run, and so invited all the other persons about them to bet with them. Many did so, each backing the horse he fancied; but before his bet was booked he was required to pay in advance to the bookmaker a deposit of the money for which he backed the horse, and the bookmaker in exchange handed to him a ticket or voucher bearing upon its face the names of both the bookmaker and the horse, and the odds laid by the bookmaker against it.

It was not suggested that the respondent had any control over, or interest in, the company, other than that he held shares in it.

The respondent did not in Tattersall's Ring confine himself to any one fixed spot or locality; he had no stool, box, umbrella, nor anything of a similar character, to denote the precise spot upon which from time to time he was carrying on his betting operations, but he moved about in the ring at his will, shouting out the odds, and making his bets in various parts of it.

As soon after each race as the winning jockey had weighed in and passed the scales "all right," the fact was publicly

signalled by the hoisting of a flag; and then the bookmakers, upon production of the vouchers, paid to the backers the bets they had won.

The magistrates determined that the case before them was governed by the case of *Snow* v. *Hill* (1), hereafter considered, which they treated as deciding that the respondent "could not be convicted unless he had a certain fixed place from which he never moved, such as a stool, umbrella, &c.," and they therefore thought that the inclosure "could not be considered a fixed place; for if so, every person who resorted to and used the inclosure, and made a bet therein, would be liable to conviction for using the inclosure for betting purposes." They accordingly dismissed the information.

The question submitted to us is whether the magistrates came to a correct decision in point of law, and if not, what should be done in the premises.

Before the passing of the statute above mentioned (the Betting Act, 1853) much betting and wagering on horse-races had been no doubt carried on without legislative interference. It is clear from the preamble of the Act now in question, that in the year 1853 a new system of betting had then recently sprung up, by the establishment of houses and offices for the carrying on in them of betting businesses of a kind which in the opinion of the Legislature tended to the injury and demoralization of improvident persons; and it is equally clear that one of the practices deemed to be objectionable and injurious was that of what is known as "ready-money betting," viz., that the person making the bet deposited with the bookmaker the money which he was disposed to adventure. It is true that the preamble has been repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), by which it is provided that such preamble may be omitted from any revised edition of the statutes; but the same Act provides (s. 1) that the repeal shall not affect the operation or construction of the statute; and it is therefore legitimately to be referred to as affording information of the circumstances under which the Act came to be passed, and in so far as it directly throws light upon the question of the object which the

(1) (1885) 14 Q. B. D. 588.

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Legislature had in view. It expressly declares that one object at least proposed by the Legislature was the suppression of this kind of gaming. It was therefore not merely to prevent its being carried on in houses or offices that the Act of 1853 for the suppression of betting-houses (16 & 17 Vict. c. 119) was passed.

Now to pass an Act simply to forbid such gaming in houses or offices would have been comparatively useless; it would have been to leave open a host of places not falling within the description of houses or offices, and impossible to describe by anticipation, where, with equal facility and equally demoralizing effect, such obnoxious betting might be carried on with impunity. See per Lush J. in *Haigh* v. *Town Council of Sheffield*. (1)

If I have correctly interpreted the object and intention of the Legislature, I must say, with all respect to the views of those who in some of the cases hereafter mentioned have intimated a different opinion, it seems to me it would be frittering away the provisions of the Act to hold that a well defined inclosure, known by a particular name, and devoted to be used as a betting-ring, could not be treated as a "place," within the meaning of the Act, unless the person charged with using it for the particular forbidden purposes, confined himself to a single spot indicated by some such thing as a stool or a box to stand on, or an umbrella stuck in the ground spread over his head; and that by changing his position from time to time, by walking about and making his bets upon different spots in the same ring, he could avoid the penalties because he was not using a place. To me this view is unintelligible; and it becomes more so when we find, as we shall when I discuss the authorities, that for permitting several bookmakers to wander about in and use the whole inclosure generally for the forbidden kind of betting, the owner or occupier might be convicted of permitting an illegal use of a place; yet that none of such bookmakers could be convicted of actually using it, because each of them used every or any part of the inclosure at his pleasure, and did not confine himself to one fixed spot in it.

(1) (1874) L. R. 10 Q. B. 102, at p. 109.

The Act (1) by s. 1 forbids the opening, keeping or using of any "house, office, room, or other place, . . . for the purpose of the owner, occupier, or keeper thereof, or any person using the same, . . . or conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing

(1) 16 & 17 Vict. c. 119 :—

"An Act for the suppression of betting houses.

"Whereas a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies"; for the suppression thereof be it enacted as follows:

[This preamble is repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), subject to the qualification mentioned in this judgment, ante, p. 583.]

Sect. 1: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

Sect. 2: "Every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming house, within the meaning of an Act 8 & 9 Vict. c. 109, 'to amend the law concerning games and wagers.'"

Sect. 3: "Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of, or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall" be liable to a penalty not exceeding 100*l*., and costs, or if to the justices it shall seem fit to imprisonment.

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being received by or on behalf of such owner, occupier, keeper or person as aforesaid as or for the consideration for any" bet on any horse-race, and declares that "every house, office, room or other place opened, kept or used for the purposes aforesaid or any of them" shall be a common nuisance; and by s. 2, "shall be taken and deemed to be a common gaming house."

It will be observed that the two sections I have just referred to have no other effect than to taint with illegality for the time being, any house, &c., or other place opened, kept or used for the purposes mentioned.

The 3rd section is that which deals with the persons who open, keep or use houses, &c., for such illegal purposes.

It enacts that:—

"Any person who being the owner or occupier of any house, office, room or other place, or a person using the same, shall open, keep or use," or permit the same to be opened, kept or used for the purposes mentioned in ss. 1 and 2 or either of them shall on summary conviction thereof be liable to forfeit a penalty not exceeding 100*l.*

It is under this section that the respondent was charged in the information.

Undoubtedly, this section is not quite so clearly framed as it might have been; and this defect has given rise to much discussion and confusion as to the proper interpretation to be put upon it.

For the respondent it is contended that the words "or other place" mean some other place ejusdem generis with a house, office, or room.

I of course recognise the usual rule observed in the construction of Acts of Parliament, that general, following specific words, should be limited to things ejusdem generis with those before enumerated; but this rule of construction must be controlled by another equally general one, that Acts of Parliament ought, like wills or other documents, to be construed so as to carry out the object sought to be accomplished by them, so far as it can be collected from the language employed: see *Harrison* v. *Blackburn* (1) and *Campbell* v. *Prescott.* (2)

(1) (1864) 17 C. B. (N.S.) 678, at pp. 690–93, per Erle C.J. and Byles J.

(2) (1808) 15 Ves. 500, at p. 503, per Sir W. Grant M.R.

In my opinion to limit the meaning of the words "other place" to some other place ejusdem generis with a house or office would have the effect of defeating, not of forwarding, the object of the Legislature, and I cannot imagine that with the desire to suppress that kind of betting mentioned in the preamble, it was in contemplation to afford it a sort of sanctuary in a betting-ring, or in any other place not ejusdem generis with a house or office.

The interpretation to be given to a similar expression used in the statute 42 Geo. 3, c. 119, making it penal for any person to keep any office or place to exercise any lottery, is expressly declared by 4 Geo. 4, c. 60, s. 60, to be any place, in or out of an inclosed building, whether upon land or water, where illegal practices shall be carried on. This confirms me in the view I have taken.

I am confirmed in this view by the authorities hereafter cited of each of the courts of common law.

Upon a careful examination of these authorities, I cannot say that all are equally satisfactory; but there is not one of the judgments, as distinguished from dicta not material to the judgment, that is against the contention of the appellant in the present case.

The case of *Doggett* v. *Catterns* (1) is that which has been most often cited in favour of the view of the respondent. The judgment itself in that case really decides nothing affecting the present question; but the dicta of the majority of the Judges are in favour of the appellant's view. It was an action brought under s. 5 of the statute of 1853 (2) to recover back

(1) (1864) 17 C. B. (N.S.) 669; 34 L. J. (C.P.) 46; and S.C. in Exch. Ch. (1865) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159.

(2) 16 & 17 Vict. c. 119, s. 4: "Any person, being the owner or occupier of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, or any person acting for or on behalf of any such owner or occupier, or any person having the care or management or in any manner assisting in conducting the business thereof, who shall receive, directly or indirectly, any money or valuable thing as a deposit on any bet on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse-race or any other race, or any fight, game, sport, or exercise, or as or for the consideration for any assurance, undertaking, promise, or agreement, express or

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from the defendant money received by him from the plaintiff as a deposit on a bet contrary to s. 4, which makes it a penal offence for any person, being the owner or occupier of any house, office, room or place used for the purposes aforesaid, to receive such deposit. The defendant, a bookmaker, was carrying on, under a clump of trees in Hyde Park, his betting operations with many persons who resorted thereto. The plaintiff was one of such persons, and he backed with the defendant for 5*l.* 10*s.* a horse about to run at the Lincoln Races, and paid then and there a deposit of that sum. The defendant thereupon laid him odds against the horse. The horse did not win; this action was then brought by the plaintiff against the defendant to recover back his deposit. The case was argued first in the Court of Common Pleas before Erle C.J. and Keating J., who gave judgment for the plaintiff. That judgment was reversed in the Exchequer Chamber, on the ground that the defendant was not the owner or occupier of the spot on which his betting took place, within the meaning of s. 4. This was quite right, for undoubtedly the defendant was neither owner nor occupier of any part of Hyde Park. The question whether the spot under the trees was a place, within the meaning of ss. 1 and 3, was not judicially determined—nor was it under the circumstances essential to the judgment.

In the Court of Common Pleas, however, in reference to its being a place, Erle C.J. said: "The mischief is, to my mind, precisely the same, whether the party stands under the shelter

implied, to pay or give thereafter any money or valuable thing on any such event or contingency, and any person giving any acknowledgment, note, security, or draft on the receipt of any money or valuable thing so paid or given as aforesaid purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the happening of any such event or contingency as aforesaid, shall" be liable to a penalty not exceeding 50*l.*, and costs, or if to the justices it shall seem fit, to imprisonment.

Sect. 5: "Any money or valuable thing received by any such person aforesaid as a deposit on any bet, or as or for the consideration for any such assurance, undertaking, promise, or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing, or the value thereof, may be recovered accordingly, with full costs of suit, in any court of competent jurisdiction."

of an oak tree or of a roof or covering of canvas." (1) Later on, when speaking of the Legislature, the Chief Justice said: "It was intended to present every possible obstacle to the professed gamester using a place for exercising his vocation, and for that purpose to prohibit the keeping or using of any known place for the receipt of deposits on the contingency of a particular horse running and winning at a horse-race." (2)

In the Exchequer Chamber (3), the Court, being composed of Pollock C.B., Crompton J., Blackburn J., Bramwell B., Channell B., Mellor J., and Pigott B., all agreed that the judgment of the Common Pleas should be reversed, upon the ground I have already mentioned. But Pollock C.B., Crompton J., Blackburn J., and Channell B. substantially agreed with Erle C.J. and Keating J. in thinking the spot was a place, within the meaning of the Act, Bramwell B., Mellor J., and Pigott B. holding an opposite view, on the ground, as stated by Bramwell B., that it was not a place capable of being used, within the meaning of the Act, and Pollock C.B., in his judgment, is reported to have said that the place had not the possibility of an owner or occupier. I cannot think that these reported expressions quite represent what the learned Judges intended to convey. Bramwell B. must have meant that it was not capable of being used, within the meaning of s. 4, because the man who used it was neither owner nor occupier; and Pollock C.B., not that it was not possible for it to be owned or occupied by anybody, but that it could not be owned or occupied by the defendant. As a matter of fact it was used, and also as a matter of fact it was owned by the Crown and capable of occupation. Various spots in Hyde Park are used daily, and anybody visiting Hyde Park will find orators, preachers, singers, lecturers, reciters, agitators, and occasionally comic entertainers and orchestras, using various greater or smaller areas in it. Do none of these occupy places? Blackburn J., to my mind, put the decision in *Doggett* v. *Catterns* (4) on its proper footing; these are his words: "I do

(1) 17 C. B. (N.S.) at p. 676.
(2) 17 C. B. (N.S.) at pp. 676, 677.
(3) The *Law Journal* is the fullest report.
(4) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159.

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not say that an open field is not a place which may come within the description of the term 'place' in the statute; but it is necessary to shew that the person against whom the action is brought" (under s. 5) "is either owner or occupier of the place, or acting on behalf of the owner or occupier, or having the care or management thereof." (1) Thus it will be seen that of the nine Judges before whom the case was argued, six expressed opinions that the spot under the trees was a place. *Doggett* v. *Catterns* (2), therefore, is in favour of, and not against, the appellant in this case.

In *Shaw* v. *Morley* (3) the appellant, as clerk to a bookmaker, sat at a desk placed on, but not affixed to, the soil, in an uncovered inclosure close to the grand stand at Doncaster, managing a deposit betting business there: Kelly C.B., Martin B., and Pigott B. held it was both an office and a place, and that the business carried on was the very thing the Act was intended to prevent.

In *Eastwood* v. *Miller* (4) the appellant was charged with permitting a certain place, "to wit a field," to be used for the purposes of betting. The field referred to was an inclosure in extent nearly four acres, and was known as the "Dewsbury Borough Park Ground." On the day named a pigeon-shooting match was about to take place, a number of people were admitted to the ground, of which the appellant was in fact the sole occupier, and he received entrance-money. Inside the inclosure among the persons so assembled were two bookmakers with books shouting out the odds on the match, and betting with those disposed to bet, receiving money by way of deposit from their customers. The appellant stood by, and could see what was going on, but said and did nothing. The justices found that the ground was a place, within the meaning of the Act, and that the appellant permitted it to be used for the purposes forbidden by ss. 1 and 3, and convicted him. On appeal against this conviction, Lush J. in his judgment said: "First, was it a 'place'? It could hardly be contended that

(1) 34 L. J. (C.P.) at p. 161.
(2) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159.
(3) (1868) L. R. 3 Ex. 137.
(4) (1874) L. R. 9 Q. B. 440.

grounds uncovered cannot be a 'place,' within the meaning of the Act. I see no reason whatever, from the framing of the Act, to hold that there cannot be a 'place,' within the meaning of it, unless it is a structure of some kind—a building or a tent." "It is an inclosed place occupied exclusively by the appellant." "The fact that it is a large inclosure cannot affect the question, if it is a place occupied and inclosed, within the meaning of the Act, to which persons were admitted by the sufferance of the occupier." The fact that the appellant was the sole occupier only shewed more clearly that he had the fullest power to check the use of it, otherwise it was immaterial. As to whether the place was used for the purpose of betting, within the meaning of the Act, the same learned judge said: "It is objected that it was only shewn that on one occasion this was done; and moreover it was objected that the primary object of keeping the place was not for the purpose of betting, but for the purpose of pigeon-shooting. . . . I cannot take this view of the evidence." Archibald J. concurred. They agreed that *Doggett* v. *Catterns* (1), which was cited for the appellant, did not govern the case, and affirmed the conviction. In *Haigh* v. *Town Council of Sheffield* (2) the appellant was convicted of permitting the illegal use of an inclosure under very similar circumstances. On appeal the Court (Blackburn, Mellor, and Lush JJ.) upheld the conviction. It would be inconvenient to set out the judgments at length, but each is well worthy of perusal.

It is difficult to draw any substantive distinction between these two cases and the present. Here the respondent used the inclosure himself; in those cases the then appellants permitted the user by others. See also *Reg.* v. *Cook*. (3) In *Bows* v. *Fenwick* (4) the appellant was convicted of using a place on the racecourse—the Roodee at Chester—for the purpose of betting. He stood on a stool in the Roodee, over which was spread a large umbrella, open and supported by a long stock or handle stuck in the ground by a spike. From this

(1) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159.
(2) L. R. 10 Q. B. 102.
(3) (1884) 13 Q. B. D. 377.
(4) (1874) L. R. 9 C. P. 339.

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stool, and under this umbrella, the appellant called out the odds against the various horses, made bets, received deposits of money, and gave tickets. It was not disputed that this was betting, within the penal clauses of the Act. The only real question was, whether it was an "other place," within the meaning of ss. 1 and 3. The Court (Lord Coleridge C.J., Brett and Denman JJ.) held that the spot used was such a place, saying that to constitute such a place it should be fixed and ascertained, and Lord Coleridge C.J. said there was (to use his own words) "sufficient fixity of the structure by means of the spiked umbrella," and he distinguished that case from *Doggett* v. *Catterns* (1) upon the grounds that there was in the latter case "no ascertained place within the ambit of the park in which the appellant (the defendant in that case) carried on his avocation." The conviction was affirmed. In the actual judgment I entirely agree, for the evidence to support it was overwhelming, but I am not prepared to adopt the dicta of the learned Chief Justice, if he intended to suggest the necessity that to constitute a place the precise spot used by the appellant to carry on his betting should be indicated, nor to agree in the distinction he drew between *Doggett's Case* (1) and that he was deciding. The "place" used by the appellant was the whole inclosure. He was entitled to use every part of it, and to change his location within it as often as he thought fit, but however often he changed it, he was still using the inclosure—a defined fixed locality—known by a name, in which he could readily announce himself to all persons resorting thereto, and they could as readily find him. The fact that the appellant did actually indicate in the manner stated the exact spot on which for the time being he was, merely added to the evidence of the user; but no case decides it was essential. Supposing a well known inclosure to be only ten yards square, could it be said that that would not be a place unless the precise spot in it on which the person using it stood were indicated? And if the appellant in the case I am now discussing had moved his stool twenty times to different spots within the inclosure, and at each spot had remounted his stool and resumed his

(1) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159.

betting, would he not still be using the one place he had paid for admission to, and not twenty different places?

The case of *Gallaway* v. *Maries* (1), before Grove and Lopes JJ., was very similar to that of *Bows* v. *Fenwick*. (2) The respondent Maries was charged with using a place, the grand stand inclosure—the ring in Four Oaks Park, for the purpose of betting, &c. The respondent and another man acting with him paid for admission to the park and ring, and therein the respondent's companion stood on a wooden box, in no way fixed to the ground, and unsheltered by any umbrella; the respondent stood off the box, on the ground by his side. They jointly carried on betting operations such as in the last case—one on, the other off the box. The justices held that neither the inclosure, nor the box, nor the two combined, constituted a place, and dismissed the charge. This case is amusing. The respondent and the justices, having evidently read the dicta of Lord Coleridge in *Bows* v. *Fenwick* (2), thought that the stool and spiked umbrella fixed in the ground were essential to the constitution of a place, and accordingly both the bookmakers and the magistrates thought the statute could be successfully evaded by the bookmakers abandoning the stool and umbrella, and by one of them using an unattached box to stand upon, and by his partner standing on the ground. The Court defeated this ingenious attempt by reversing the decision of the justices. There again there was a superabundance of evidence to support a conviction, and the dicta were unnecessary for the judgment, which was clearly right.

These two last cases establish nothing which goes beyond this—that if a fixed spot, such as suggested, was essential to be indicated, it was in fact indicated by the stool, umbrella, or box. But no case was cited in which a conviction has been quashed because of the absence of such indication. Such a case would have required more consideration.

The case of *Snow* v. *Hill* (3), which the magistrates read as governing the present case, does not in my opinion by any means do so. The appellant Snow was charged with using a

(1) (1881) 8 Q. B. D. 275; 51 L. J. (M.C.) 53.

(2) L. R. 9 C. P. 339.

(3) 14 Q. B. D. 588.

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place, to wit a field at West Brompton in Staffordshire, for the purpose of betting with persons resorting thereto. Dog-races were held in an inclosed field about five acres in extent. The public were admitted on payment to a portion of the field about 100 yards long by seven yards deep, roped off from that part of the field on which races were run. Many hundreds of persons including the appellant were present. The appellant walked about and made bets, and received from, and paid money to, other persons who were there. He had no particular location on the reserved space, and carried no distinctive mark. It was not even proved that he was a bookmaker, or that he did anything to indicate that he was exercising such a calling; for aught that appeared he was only one of the persons resorting to the inclosure, and did no more than any one of them might innocently do, and there was no evidence that he received any money on deposit, or otherwise than in payment of bets he had won. The magistrates, however, erroneously thought the case governed by *Eastwood* v. *Miller* (1), and convicted him. An appeal against the conviction was heard by Lord Coleridge C.J. and A. L. Smith J., who reversed that decision. In so doing they were absolutely right. A. L. Smith J. pointed out in delivering the judgment of the Court that the mere fact of a person resorting to a place, and betting with others he finds there, is no offence under the Act. It is significant that the respondent did not even appear or make any attempt to support the conviction. *Snow* v. *Hill* (2) is therefore no authority for the respondent in this case.

Two cases, *Whitehurst* v. *Fincher* (3) and *Hornsby* v. *Raggett* (4), were cited to us, the former as an authority in favour of the respondent, the latter as an authority for the appellant. They require a little close attention and consideration; for on a mere cursory glance at the head-note of the first of them, as reported, they appear to be a little contradictory. They are, however, not at all so when really understood. The first of them, *Whitehurst* v. *Fincher* (3), was argued before Fry L.J.

(1) L. R. 9 Q. B. 440.
(2) 14 Q. B. D. 588.
(3) (1890) 17 Cox, 70.
(4) [1892] 1 Q. B. 20; S.C. 17 Cox, 428.

and Mathew J. Fincher, the defendant, was charged with using the bar-room of a public-house for the purpose of betting with persons resorting thereto; the facts were as follows: Fincher on three successive days went to the bar-room of the Dartmouth Hotel at West Bromwich for the purpose of betting on horse-races, and did there in fact bet with persons who resorted thereto. He occupied no specific part of the room, which was a public one, and he had no other interest of any kind in the house. There was no evidence that he was a professional betting-man. For aught that appeared the defendant only resorted to the bar as one of the public; and when there, did in fact make bets with persons whom he met. The magistrate took this view of the evidence, and held that this was not such a user of the room as was contemplated by the 3rd section of the statute. In his judgment, supporting the magistrate's decision, Mathew J. is reported to have said that it was not sufficient merely to shew that the defendant went to the bar-room and made bets, and he thought that on the facts proved *Snow* v. *Hill* (1) governed the case. I recognise the soundness of that decision on the facts found, for there is no more illegality in making a casual bet in a room not wholly or partially devoted to betting than there is in making it in a field with a person who is casually found there.

Hornsby v. *Raggett* (2) was a very different case: there Raggett, the respondent, was himself the occupier of The Chimes licensed beerhouse at Poplar. The magistrate found as facts, that on five different days a professional bookmaker and his clerk were in the bar and tap-room for the purpose of betting, that they did bet with persons resorting thereto on horse-races, and received deposits on the bets made, and that the defendant knew of and permitted such user. As a matter of fact neither the bookmaker nor his clerk used any part of the house except the bar and tap-room, and these only in common with the ordinary customers of the house. The magistrate dismissed the summons on the authority of *Whitehurst* v. *Fincher* (3) and *Snow* v. *Hill*. (1) On appeal the Court

(1) 14 Q. B. D. 588.
(2) [1892] 1 Q. B. 20.
(3) 17 Cox, 70.

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(Mathew J. and A. L. Smith J.) held the magistrate to be wrong, Mathew J. holding that it was not necessary to a conviction that the room or place should be used exclusively for betting; that to render the bookmaker liable it would be enough to shew that he was in a room for the purpose of inviting people to come and bet with him, and that the respondent, the occupier, was liable for permitting such user. In explaining his judgment in *Whitehurst* v. *Fincher* (1) as supporting the case then before him, that learned Judge said: "In the present case the betting was not casual, but the room was constantly and systematically used by a professional bookmaker for the purpose of betting with persons resorting thereto." In this A. L. Smith J. concurred. It is clear that the distinction between the two cases, whatever particular expressions may have been used or may appear in the report of *Whitehurst* v. *Fincher* (1), is, that in that case the use of the room was not for betting as a business, but that all that was done was that the defendant had casually betted there with three or four people, whereas in *Hornsby* v. *Raggett* (2) the betting for which the room was used was that carried on as a business by a professed or professional bookmaker.

In considering the question of user, I can see no difference between a betting-ring and a room used for the same purpose.

M'William v. *Dawson* (3) was a charge against a bookmaker for using a place under s. 3. The bookmaker was seated in the bar of a public-house on several days for nearly an hour, not always in the same spot, betting on horse-racing with a number of persons who frequented the house. Some paid to and others received from him money on account of bets. It was found that he used the bar for the purpose of betting with them, but that he had no exclusive use or occupation of the bar or any part of it. The magistrate refused to convict. On appeal Mathew and A. L. Smith JJ. held that the case could not be distinguished from *Hornsby* v. *Raggett* (2), and that the bookmaker was liable to be convicted of using a place for the purpose

(1) 17 Cox, 70.

(2) [1892] 1 Q. B. 20.

(3) (1891) 56 J. P. 182.

of betting, under s. 3, and that the same reasons applied to the licence-holder.

In *Reg.* v. *Worton* (1) it was held that evidence that on three successive days the defendant was in the bar of a beerhouse, that a number of persons came in, took slips of paper hanging on a wall, wrote on them the names of the horses they wished to back, wrapped up in them the money they wished to stake, and handed the slip inclosed with money to the defendant, furnished sufficient evidence to go to the jury upon an indictment under s. 3, and the jury rightly found, that the defendant had used the bar for the purpose of betting with persons resorting thereto—per Lord Russell of Killowen C.J., Pollock B., Hawkins, Lawrance and Wright JJ.

Liddell v. *Lofthouse* (2) is the latest case to be found in the common law reports bearing on the question as to what is an "other place." The respondent Lofthouse was charged at the Stockton-on-Tees police court with having used a place situated on the river side for the purpose of betting with persons resorting thereto. The place in question was called Hubback's Quay, partly surrounded by a hoarding supported by wooden stays driven into the ground. On three consecutive days the respondent was found at the back of this hoarding, between the same two stays, calling out the odds on horses, and betting with persons coming to him. The justices found that he went to this spot for the sole purpose of making a book on horse-races and because he knew there would be a number of persons wanting to back horses there. The justices however, doubting whether the spot was a place, declined to convict. On appeal Lindley and Kay L.JJ., sitting as a Divisional Court, held that it was a place, and that the justices were wrong in not convicting. That this decision on the facts stated was right there can be no shadow of doubt, and it needed not the aid of the stays to support it.

I will but refer to my own judgment in *Reg.* v. *Preedy* (3), in which I fully discussed the question now before us, and to which I adhere. Nor do I think it would materially assist

(1) [1895] 1 Q. B. 227. (2) [1896] 1 Q. B. 295.
(3) (1888) 17 Cox, 433.

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the solution of the question before us to cite any of those cases which have been decided upon charges under the Licensing Acts, for they stand on a different footing, nor to those cases which are to be found forbidding any gaming in public streets, &c., for they depend on special enactments, nor the cases deciding what are public places under the Vagrant Acts.

I prefer to decide this case upon principle, and upon authorities directly bearing upon it.

It is not possible to give so precise a definition of what is an "other place" as shall be applicable to every imaginable state of facts. Each case must of necessity depend and be decided upon its own particular circumstances. But after very careful consideration I have arrived at the conclusion that any area of inclosed ground (expressing no opinion as to uninclosed areas), covered or uncovered, which is known by a name, or is capable of reasonably accurate description, to which persons from time to time or upon any particular occasions or occasion resort, and who may very properly be described as resorting thereto, used by a profesional betting-man for the purpose of exercising his calling, and betting with such persons, or for the purpose of carrying on a ready-money betting business, may be a place, within the meaning of the statute. Metes and bounds are not essential, and it matters not in my opinion whether for his own convenience the bookmaker chooses to remain during his hours of attendance upon one particular spot within that area, or whether he prefers to move about within that area from one spot to another as he is minded. The Act speaks of an other "place"—not a "spot" in a place. If to make it a place the bookmaker must fix himself on and use only one spot, he would always have it in his power to evade the Act by wandering over the whole area.

Assuming that the ring in question was a place, within the meaning of the statute, there was in my opinion abundant evidence of such user of it by the respondent as is forbidden by s. 3.

It was indeed suggested that there could be no illegal user of any place unless such place could be fairly described as then already opened, kept, or used—that is, appropriated wholly or in part for the illegal purposes mentioned in s. 3. *Morley* v.

Greenhalgh (1) was cited in support of this suggestion. That case, however—as also did *Clark* v. *Hague* (2)—turned upon the peculiar language of 12 & 13 Vict. c. 92, forbidding cock-fighting in a place used for that purpose, and does not assist in the present discussion. In my opinion, a person using a place, though it be for the first time, for the forbidden purposes is liable to be convicted under s. 3: see per Blackburn J. in *Haigh* v. *Town Council of Sheffield.* (3) At one time it was looked upon as a doubtful question whether the Legislature intended the enactments to prohibit, and whether in fact they prohibited, anything more than that class or kind of gaming which consisted of receiving deposits of money as the consideration for bets on future events described in the now repealed preamble of the Act. I am of opinion that to adopt such a restricted interpretation of the enacting clauses would be to do violence to the very plain unmistakable words used in them. Moreover, the question was judicially set at rest by *Bond* v. *Plumb* (4), where it was held by Lord Coleridge C.J. and Collins J. that betting with persons resorting to a place and receiving deposits on bets were distinct offences: see also *Reg.* v. *Brown* (5) and *Reg.* v. *Worton.* (6)

In the case before us there was, in my opinion, abundant evidence that the respondent used the Tattersall's Ring at Hurst Park for both purposes. In dealing with the evidence in each particular case, the magistrates should always bear in mind that the law does not forbid betting itself, nor is the business or avocation of a bookmaker necessarily illegal: *Thwaites* v. *Coulthwaite.* (7) But what the Legislature has forbidden, and what it has pronounced to be illegal, is the use by those who make a trade and business of betting of any place for the purpose of betting with persons resorting thereto, *or* for the purpose of receiving, either themselves or by any other person, any money or valuable thing as the consideration for a bet or bets on any event of any horse-race, &c.

(1) (1863) 3 B. & S. 374; 32 L. J. (M.C.) 93.
(2) (1860) 8 Cox, 324; 2 E. & E. 281.
(3) L. R. 10 Q. B. 102, at p. 108.
(4) [1894] 1 Q. B. 169; 17 Cox, 749.
(5) [1895] 1 Q. B. 119.
(6) [1895] 1 Q. B. 227.
(7) [1896] 1 Ch. 496.

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We are not called upon to do more than declare our opinion upon the law as applicable to cases like the present. Whether an individual charged with infringing the law has in fact been guilty of such infringement, it is the duty of the magistrates to determine, bringing their best intelligence honestly to bear upon each particular case, having regard to the facts before them. In the present case we are of opinion that the justices took an erroneous view of the law; and the case must therefore be remitted back to them, with costs to be paid by the respondent.

Case remitted.

Solicitors for appellant: *Malkin & Co.*
Solicitor for respondent: *Theodore Allingham.*

P. B. H.

1896 *Dec.* 18.
1897 *March* 13.

McINANEY, APPELLANT *v.* HILDRETH, RESPONDENT.

Gaming—Place used for Betting—"Betting with Persons resorting thereto"—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The respondent, a professional bookmaker, was charged with using a certain place called "The Pit Heap" for the purpose of betting with persons resorting thereto upon contingencies concerning horse-races.

The Pit Heap was a piece of ground, comprising about one-eighth of an acre, bounded by various buildings and hoardings and a row of posts and a road. It was occasionally occupied by shows, for which rent was paid to the owner; otherwise the public had free access. On the day in question no one was in personal charge of it. On that day the Lincolnshire Handicap was run. In the morning a crowd began to assemble on the Pit Heap, and soon afterwards the appellant came on to the ground, and stationed himself at a point on it, with his back against a hoarding, where he remained about three hours. During that time men in the crowd came to him, gave him money, and made bets with him on the Lincolnshire Handicap, of which he made entries in his betting-book.

The justices found that the spot where the appellant stood was a "place," and was used by him "for the purpose of betting with persons resorting thereto," within the meaning of the Betting Act, 1853.

On a case stated:—

Held, that the decision of the justices was right, and the appellant was rightly convicted under s. 3.

CASE stated by justices.

An information was preferred by the respondent, an inspector

of police, against the appellant, under 16 & 17 Vict. c. 119, s. 3, for that the appellant, on March 24, 1896, then being a person using a certain place called the Pit Heap, did unlawfully use the said place for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to certain horse-races.

The facts which were proved at the hearing before the justices, and were set out in the special case, are fully stated in the judgment of the Court.

The sections of the Betting Act, 1853 (16 & 17 Vict. c. 119), on which the decision turned, are set out in a note to the judgment in *Hawke* v. *Dunn*. (1)

It seemed to the justices that the spot where the appellant stood was a clear, ascertained, and well-defined place used by the appellant for the purpose of betting on horse-races, and that the Pit Heap itself was also a place used for such purpose of betting, and they found that the appellant used the place marked on the plan for the purpose of betting, and that the continuance of the appellant in one spot, where he was always, and could always be found by persons wishing to bet, and his return to the same spot after the interval, was a sufficient user for the purposes aforesaid, although no other day was alleged except March 24, 1896, and that being so, they decided to convict the appellant.

The question upon which the opinion of the Court was desired was, whether the justices came to a correct determination and decision in point of law, and if not what should be done in the premises.

1896. Dec. 18. *Clarke Hall*, for the appellant. The conviction was wrong. The spot occupied by the appellant, when he stood with his back against the hoarding of the skittle-alley, was not a "place," within the meaning of the Act; but even if it was, he did not use it illegally, because it was not shewn that he had ever previously used it for a similar purpose. A single act of user may be sufficient in the case of an owner or occupier; but it is otherwise in the case of a person who is neither. To

(1) Ante, pp. 585, 587, notes.

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make the spot in question a "place," there must be either some act of appropriation, as by the use of a desk, stool, fixed umbrella, &c., or a course of frequenting the spot must be shewn. Both elements are absent here. The whole of the uninclosed piece of land called the Pit Heap cannot be described as a "place."

Simey, for the respondent. In two senses the appellant is shewn to have used a "place." First, the spot on which he stood with his back to the hoarding, and where he is proved to have remained for hours waiting for persons to come and bet with him, was clearly a place, and the evidence is conclusive to shew that he was using it for a purpose expressly prohibited by the Act. A "place" need not be fenced in, nor is it necessary, in order to bring the case within the words of the statute, to shew that any of the artificial methods of occupation described in some of the cases have been adopted. An "other place" need not be ejusdem generis with house, office, or room. Secondly, the whole of the Pit Heap is a place, within the meaning of the statute.

[The authorities referred to in argument are dealt with and commented on in the judgment of the Court, and in the judgment in *Hawke* v. *Dunn*. (1)]

Clarke Hall replied.

Cur. adv. vult.

1897. March 13. HAWKINS J. I have the authority of all the learned Judges who sat with me and heard the argument in this case (Cave, Wills, Wright and Kennedy JJ.) for stating that they concur in the judgment which I am about to read. [The learned Judge then read the following judgment:—]

The respondent, an inspector of police in the borough of Jarrow, charged the appellant with using a certain place in that borough, called "The Pit Heap," for the purpose of betting with persons resorting thereto, upon contingencies concerning horse-races, contrary to s. 3 of the Betting Act, 1853.

Nine justices for the said borough, before whom the charge came on for hearing, convicted the appellant, but on his appli-

(1) Ante, p. 579.

cation they stated this case for our opinion, the question being whether in law they were justified in convicting him.

The Pit Heap is a piece of private, though at present vacant, ground in the borough of Jarrow, comprising, according to the plan, about one-eighth of an acre of land. To a great extent it is bounded on the north by the Theatre of Varieties, on the east by a skittle-alley, on the west by a row of posts and a road, and on the south by a public-house and a shooting-gallery. Although there is an owner and a tenant of it, and it is occasionally allowed to be occupied by shows, for which rents are paid, the public have been permitted and allowed by such owner and occupier free and easy access to it and to resort thereto. On the day in question no one was in actual personal charge or superintendence of it. On March 24, 1896, the Lincolnshire Handicap was run at Lincoln. About half-past 10 A.M. a crowd consisting of 100 persons began to assemble on the Pit Heap, some reading sporting papers, and others discussing racing matters. About 11 A.M. the appellant came on to the ground, and at once stationed himself at a point on it, with his back against the hoarding of the skittle-alley. The spot where the appellant stood was found by the justices to be a clear, ascertained, fixed, and well-defined place. With the exception of a short interval of ten minutes, the appellant remained on the same spot until 2.45 P.M. During that time many of the men comprising the crowd came up to him and gave him money, and as they did so he on each occasion made an entry in what was, in fact, his betting-book. At 2.45 P.M. the police, who had been watching his action, interfered, and took from him the betting-book containing numerous entries of bets. One page of it, headed "The Lincolnshire Handicap, 1896," contained, among others, an entry, "16—2s Osterman." This interpreted means, that he had laid Osterman, who was identified as one of the persons who had paid him money, 16*s.* to 2*s.* against a horse about to run in the race. At the hearing before the magistrates it was admitted that the appellant was a professional bookmaker, and that on the day and at the place above mentioned he was making bets on the Lincolnshire Handicap. It was also proved that other betting

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men, following their avocations and acting in a similar manner, were on the ground.

The magistrates found that the spot where the appellant stood was a "place," and that it was used by him for the purpose of betting on horse-races, with those resorting thereto, within the meaning of the 3rd section of the Act.

The question for us was whether the justices came to a correct determination in law.

For the appellant it was contended that the spot occupied by him was not a "place," within the meaning of the Act; and that, even if it was, he did not use it illegally, because it was not shewn that it had been used for a similar purpose before the day in question. I am of opinion that this latter point is untenable, there being no authority to support it, the case (1) which was cited for that purpose having been decided upon a statute relating to cock-fighting, totally differing from the present.

On the argument before us all the authorities bearing on the subject of what is a place were fully discussed; but having dealt with them in my judgment in *Hawke* v. *Dunn* (2), I do not find it necessary now to repeat all that I there said.

Doggett v. *Catterns* (3) was strongly relied on for the appellant; but the decision in that case turned, not upon the question whether the spot under the trees was a place under s. 3, but upon the fact that it was not a place owned or occupied by the defendant under ss. 4 and 5. If the defendant in that case had been prosecuted under s. 3 for using the spot for the purposes forbidden by ss. 1 and 3, it is clear that six of the nine judges by whom the case was heard would have held him responsible; but, sued as he was, in a civil action, under s. 5, for a return of the deposit, he could not be made liable without proof that he was either owner or occupier of the place where the deposit was received by him. Such proof was not, and could not from the nature of things have been, forthcoming, and so the action failed. But no such proof is necessary in the case of an information to recover a penalty under s. 3 for using a place for the

(1) *Morley* v. *Greenhalgh*, (1863) 3 B. & S. 374. (2) Ante, p. 579.
(3) (1865) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159.

forbidden purposes. I never could understand the reasoning of those who urged that the spot under the clump of trees could not be deemed to be a place. The locality was fixed at and under the trees. It was limited to the space overshadowed by their branches; people in fact resorted to it for the purpose of betting on horse-races, and the bookmaker went there to meet and bet with them, and stayed there to bet with them upon the ready-money system. What then was wanting to constitute it a place? The fact that the man had no authority to use it was immaterial. He could not have sheltered himself by urging his trespass as a defence, for the penalty attaches to the person using a place, whether such place is so used with or without the leave of the owner or occupier. But I need not further elaborate the matter, for there is direct authority to justify us in dealing with it, as even without authority we should have done. In the case of *Liddell* v. *Lofthouse* (1), a bookmaker pursuing his calling, betting with persons resorting to the spot on which he had located himself, received deposits on such bets; Lindley and Kay L.JJ. sitting as a Divisional Court held that to be a "place." I cannot help thinking that they must and would have come to the same conclusion if the stays had not been there. Indeed Kay L.J. said: "As it seems to me, if a man were to use the ground at the foot of the statue at Charing Cross for the purpose of habitually betting with persons resorting to him there, that, although the space used was entirely undefined, would be a place within the meaning of the 'statute.'" The truth is that some little good sense must be imported into the consideration of these cases.

In this case the appellant evidently went to that particular spot on the Pit Heap to bet with those who had been brought together there in the expectation of finding him there to bet with. He stood on the spot, with his back to the skittle-alley, and so used it for hours. He was as conspicuous as if he had had a sentry-box to stand in. Would it have made any difference if he had stood on a box, interposed a layer of wood between his feet and the ground, or had sat on a high porter's chair, carrying on that kind of betting which most of all the Legislature

(1) [1896] 1 Q. B. 295.

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meant to suppress in every place where it was or could be publicly carried on? Can anybody seriously suppose the Legislature meant to exclude from the operation of the Act such betting, on such a place? Or, that its being or not being a place should depend on whether the betting-man was or was not hemmed in by a couple of pieces of wood, or had a gaudy umbrella over his head, or stood on a stool or box, or was or was not a trespasser on the place he was so using? Provided always that the user for the time being was of a locality to which persons can properly be said to be resorting, and where he could carry on his operations with those persons.

On principle, confirmed by the authorities cited, I think the magistrates were right in their decision, and this conviction ought to be affirmed with costs.

Conviction affirmed.

Solicitor for appellant: *P. G. Robinson, for E. Clark, Newcastle-upon-Tyne.*

Solicitor for respondent: *James Kirkley, for J. Oswald Davidson, Jarrow.*

P. B. H.

THE TRUSTEE OF THE PROPERTY OF NEW, PRANCE & GARRARD *v.* HUNTING.

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Feb. 25, 26, 27;
March 4, 6.

Bankruptcy—Voluntary Conveyance to make good Breaches of Trust—Revocable Mandate—Fraudulent Preference—Evidence—Notes of Bankrupt's Public Examination—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 17, 48.

P. two days before his bankruptcy executed a deed whereby he conveyed a freehold estate, of which he was the owner, to H. upon trust to raise thereout by sale or mortgage 4200*l.*, and therewith to make good divers breaches of trust which he had committed in respect of certain scheduled trust estates of which he was sole trustee or joint trustee. By the deed P. charged the property conveyed with the payment of the 4200*l.*, and conferred on H. a power to appoint new trustees. The deed was made without any pressure and was not communicated to any of the beneficiaries:—

Held, that the deed was not a revocable mandate, but created the relation of trustee and cestui que trust as between H. and the beneficiaries under the trust estates and was irrevocable:

Held, also, that the trust estates were not creditors of P. within the meaning of s. 48 of the Bankruptcy Act, 1883, and therefore that the deed was not a fraudulent preference under that section.

Ex parte Taylor, (1886) 18 Q. B. D. 295, and *Ex parte Ball*, (1887) 35 W. R. 264, followed on this point.

When a bankrupt is a party to an action, not in his individual interest, but in a representative capacity, the notes of his public examination cannot be read as evidence against him.

Observations on the mode of applying the words "with a view to prefer" in s. 48.

THIS was an action which raised the question whether a deed executed by the bankrupt Prance was void as against his trustee in bankruptcy.

Messrs. New, Prance & Garrard were a firm of solicitors practising at Evesham, in the county of Worcester. In November, 1893, New, the senior partner, died insolvent, and the business of the firm was carried on by Prance & Garrard, the surviving partners, until March 31, 1894, when a receiving order was made against them on their own petition, and they were subsequently adjudicated bankrupts. Their trustee in bankruptcy also became, under an administration in bankruptcy pursuant to s. 125 of the Bankruptcy Act, 1883, and s. 21 of the Bankruptcy Act, 1890, trustee of the estate of New, deceased.

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The firm had to their own knowledge been hopelessly insolvent for some years.

On March 29, 1894, Prance executed a deed whereby he conveyed a freehold property, known as the Longdon Hill estate, of which he was the owner in fee, to the defendant Hunting upon trust to raise thereout by sale or mortgage the sum of 4200*l.*, and therewith to make good divers breaches of trust which Prance, either as sole trustee or joint trustee, had committed in respect of eight scheduled trust estates. And by the same deed Prance charged the Longdon Hill estate with the payment of the said sum of 4200*l.* thereby directed to be raised; provided that if the moneys ultimately required for the rectification of and completely satisfying the said breaches of trust should be less than the said sum of 4200*l.*, then that the difference or surplus should be held in trust for and should be paid over to Prance; and further, that if, when the whole of the payments intended to be thereby secured should have been made and perfected, any parts of the hereditaments thereby conveyed should remain in Hunting unsold, then he should forthwith, upon completion of the trusts, reconvey such unsold hereditaments unto Prance. The deed also conferred upon Hunting, his executors and administrators, a power to appoint new trustees for the purpose of carrying into effect the trusts of the deed.

The draft of this deed was prepared by Prance as early as April, 1892, and the recitals (so far as material) then ran as follows:—

"And whereas the said C. C. Prance is the active trustee in the trusts mentioned in the first column of the schedule hereunder written and on the happening from time to time of the payment off of the securities on which the trust funds thereof have been invested he has allowed the same to be paid into the general banking account of the said firm of New, Prance & Garrard pending their reinvestment on other securities with the result that as to the sums mentioned in the second column of the first part of the said schedule hereto there are at the present time no securities appropriated for the same and as to the trusts mentioned in the second column of the second part

of the said schedule the trust funds have been invested in securities yet by reason of the agricultural depression and the depreciation of land since the investment was made it is estimated that such securities are deficient in value to the amount mentioned in the second column of the second part of the said schedule And whereas the said C. C. Prance for the better satisfaction of his co-trustees and the beneficiaries of the said trust estates respectively has consented and agreed to execute these presents Now this indenture witnesseth that in pursuance of the said agreement and in order to effectuate the same he the said C. C. Prance as beneficial owner doth hereby convey," &c.

The draft remained in this form until a few days before the bankruptcy, when Prance went to Birmingham and had a conference with counsel, and then the above recitals were altered to run as follows:—

"And whereas the said C. C. Prance is a trustee in the trust estates mentioned in the schedule hereunder written and on the happening from time to time of the payment off of the securities on which the moneys of such trust estates have been invested he has allowed such moneys to be paid into the general banking account of the said firm of New, Prance & Garrard pending their intended reinvestment on other mortgage securities with the result that in some instances there are at present no securities at all appropriated for the same and in other instances although the trust funds are invested on securities yet by reason of the agricultural depression and the depreciation of land since the investments were made or from death of the mortgagor or from other causes it is estimated that such securities are deficient in value and will not produce the amounts nominally secured thereby And whereas it is apprehended that such dealing with the said trust funds has been a breach of trust or breaches of trust for which the said C. C. Prance is personally responsible to the several cestui que trustent And whereas the said C. C. Prance to rectify such breaches of trust as far as may be and thereby to shield and exonerate himself as far as possible from liability to the proceedings he is now or may at any time hereafter be exposed to

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by reason of such breaches of trust is desirous of executing these presents Now this indenture witnesseth that in pursuance of such desire and in order to effectuate the same and for the special reason and consideration hereinbefore recited he the said C. C. Prance as beneficial owner doth hereby convey," &c.

The draft thus altered was engrossed and executed on March 29, 1894. The fact that this deed had been prepared and executed was not communicated to any of the co-trustees of Prance, or to any of the beneficiaries, or to any of his creditors.

In January, 1896, the plaintiff commenced this action against Hunting, Prance, and others claiming a declaration that the deed of March 29, 1894, was void as against him as such trustee in bankruptcy on the ground that the deed and the trusts thereof were revocable, and were in fact revoked by the bankruptcy of Prance; and in the alternative, on the ground that the deed was a fraudulent preference within the meaning of s. 48 of the Bankruptcy Act, 1883.

The defendant Hunting, who at the date of the deed was the principal clerk in the accountant's department of the firm, by his statement of defence submitted to act as the Court should direct. He subsequently died, and was not represented at the trial of the action.

The defendant Prance was still the sole trustee of three of the trust estates mentioned in the schedule to the deed. He was also co-trustee with the defendant Jackson, and with the defendant Cardew, of two other trust estates mentioned in such schedule. The defendant Kent had, since the bankruptcy, been appointed a new trustee in the place of Prance of another of the trust estates mentioned in the schedule; and the defendants Wenden and Hardman had, since the bankruptcy, been appointed new trustees in the place of Prance of the remaining two trust estates mentioned in the schedule. All these defendants (other than the defendant Jackson, who did not appear) resisted the plaintiff's claim.

The action now came on for trial, and beyond the facts above mentioned there was no evidence that the defendant Prance, at

the time he executed the deed, was under any pressure or in fear of any legal proceedings against himself as a defaulting trustee. It appeared, however, that he was trustee of three other trust estates not mentioned in the schedule. One of these had been omitted by mistake, and his breaches of trust in respect of the other two trusts were of small amount.

Muir Mackenzie and *R. Harington*, for the plaintiff, proposed to read against the defendant Prance the shorthand notes of his public examination.

P. Van Neck, for the defendants Prance and Cardew, objected. Prance is a defendant as a trustee of some of the scheduled trust estates, and the notes of his public examination are not evidence against him in his representative capacity as a trustee, nor against his beneficiaries: *In re Brünner*. (1) The defendant Prance is in court, and if the plaintiff desires to rely on anything Prance has said he must call him as a witness subject to cross-examination.

Muir Mackenzie, for the plaintiff. The Court has power under s. 17 of the Bankruptcy Act, 1883, to allow these notes to be read against Prance, and it is submitted that this should be done. The plaintiff is not bound to call a hostile witness. It is for the other defendants to cross-examine Prance. He is a party interested under the trusts in the deed.

VAUGHAN WILLIAMS J. What a trustee says or does in the exercise of his duty is evidence against his beneficiaries. But what he says or does in other respects is not evidence against his beneficiaries. In my judgment the section does not apply. At common law these notes are not receivable in evidence. The defendant Prance defends this action in a representative capacity, and in the exercise of my discretion under the section I shall not allow these notes to be read. If there is anything to be proved by Prance's evidence the plaintiff must call him as a witness.

Muir Mackenzie. The plaintiff declines to call Prance as a witness. On the main question there are two points. First,

(1) (1887) 19 Q. B. D. 572.

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the deed was in the nature of a revocable mandate and was revoked by the bankruptcy. If it did operate to create the relation of trustee and cestui que trust as between Hunting and the beneficiaries under the scheduled trust estates, it is admitted that the plaintiff has no case, apart from the question of fraudulent preference. But it is contended that it did not have that effect. It was a mere voluntary conveyance made without request and without any communication to any of the beneficiaries, and only amounted to a mandate to Hunting as Prance's agent to raise 4200*l.* and pay certain debts, and the surplus, if any, was to be repaid to Prance. He could have revoked the deed the next day. It falls within the principle of *Garrard* v. *Lord Lauderdale* (1); *Acton* v. *Woodgate* (2); *Johns* v. *James* (3); *In re Ashby* (4); *Synnot* v. *Simpson*. (5) Secondly, the deed was a fraudulent preference within the meaning of s. 48 of the Bankruptcy Act, 1883. The trust estates were creditors of Prance. No doubt *Ex parte Stubbins* (6) and *Ex parte Taylor* (7) are against this view. But *Ex parte Stubbins* (6) was decided under the Bankruptcy Act of 1869; and the decision in *Ex parte Taylor* (7) was questioned and followed with reluctance in *Ex parte Ball*. (8) Lastly, on the evidence Prance preferred some trust estates and omitted others.

Upjohn, for the defendant Kent. The deed is not a revocable mandate. It is a question of intention in each case. The distinction between a conveyance for the benefit of creditors generally and a trust created for the benefit of particular persons is pointed out in *Smith* v. *Hurst*. (9) This deed falls under the latter class of cases. The change in the recitals shew a change of circumstances, and how matters were pressing on Prance. The inference is that he was desirous of protecting himself against the penal consequences of his breaches of trust. The fact that the deed was not communicated to the bene-

(1) (1830) 3 Sim. 1; 2 Russ. & My. 451.
(2) (1833) 2 My. & K. 492.
(3) (1878) 8 Ch. D. 744, 751.
(4) [1892] 1 Q. B. 872.
(5) (1854) 5 H. L. C. 121.
(6) (1881) 17 Ch. D. 58, at p. 69.
(7) 18 Q. B. D. 295.
(8) 35 W. R. 264.
(9) (1852) 10 Hare, 30, at p. 47.

ficiaries is immaterial. The deed on its true construction was intended to be absolute and irrevocable, and created the relation of trustee and cestui que trust as between Hunting and the scheduled trust estates. The charge of the 4200*l.* on the property conveyed and the power conferred on Hunting to appoint new trustees support this view. Next, the deed is not a fraudulent preference. The trust estates were not creditors within the meaning of s. 48. On this point the Court is bound by the decisions in *Ex parte Stubbins* (1), *Ex parte Taylor* (2), and *Ex parte Ball.* (3) Lastly, the omitted trusts are very small and not of any weight.

Clayton, for the defendants Wenden and Hardman, argued to the same effect.

P. Van Neck, for the defendants Prance and Cardew.

Muir Mackenzie, in reply. The alterations in the recitals were not the result of any pressure, but were made by Prance voluntarily to give colour to the deed. Breaches of trust having been committed, the trust estates were creditors of Prance within s. 48: *Gibbs* v. *Glamis* (4); *Wilson* v. *Balfour* (5); *Ex parte Kelly.* (6)

Clayton, on the cases last cited.

Cur. adv. vult.

March 6. VAUGHAN WILLIAMS J. This is an action brought by the trustee in bankruptcy of the property of H. New, deceased, and of C. C. Prance and G. Garrard, against W. Hunting, C. C. Prance, A. H. Jackson, and others, for a declaration that a conveyance of March 29, 1894, by Prance to Hunting of the Longdon Hill estate on certain trusts is void as against the plaintiff.

The grounds upon which it is said that the conveyance is void are two: first, that the conveyance was a revocable instrument not creating the relation of trustee and cestui que trust as between Hunting and the persons, or trust estates, mentioned in the schedule, in whose favour the trust purported to be

(1) 17 Ch. D. 58, at p. 69.
(2) 18 Q. B. D. 295.
(3) 35 W. R. 264.
(4) (1841) 11 Sim. 584.
(5) (1811) 2 Camp. 579.
(6) (1879) 11 Ch. D. 306.

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created. Secondly, that the conveyance was a fraudulent preference under s. 48 of the Bankruptcy Act, 1883.

Now, in order to decide these questions, it is sufficient to state shortly the facts giving rise to the contentions without going into the details relating to each case. Prance was a trustee under several wills and settlements, and he was guilty of several breaches of trust in respect of the trusts thereby created. The breaches consisted of a misappropriation of trust funds or of improper investments. Prance, being conscious of these breaches of trust, conveyed the Longdon Hill estate, of which he was the owner, to make good the deficiencies caused by those breaches of trust to Hunting, an accountant in the employ of his firm. The defendants are trustees of the trust estates mentioned in the schedule. The conveyance was made two days before the bankruptcy, and without any pressure being put upon Prance either by his co-trustees or by the cestuis que trustent. The fact of the making of the conveyance was not communicated to the other trustees or to the cestuis que trustent.

In my judgment the conveyance of the Longdon Hill estate was not a revocable instrument, and did create the relation of trustee and cestuis que trustent as between Hunting and the beneficiaries under the scheduled trust estates. It was, of course, not denied in argument that if the relation of trustee and cestuis que trustent was established, the plaintiff in this action must fail, apart from the law of fraudulent preference. But it was said that the legal transfer of the property did not create such a relation, because the case fell within the doctrine of *Garrard* v. *Lord Lauderdale* (1) as being a mere mandate to Hunting, as the agent of the donor Prance, to apply the estate or its proceeds in satisfaction of the breaches of trust, and that such an arrangement was made merely for the convenience of Prance, and was revocable by him at any time. In my judgment this was not the nature of the transaction. In the first place, I doubt whether the cestuis que trustent were creditors within the rule that a legal transfer of property made to trustees for the payment of the debts of the transferor without the

(1) 3 Sim. 1.

knowledge or concurrence of the creditors does not invest creditors with the character of cestuis que trustent, but amounts merely to a direction to the trustees as to the modes in which they are to apply the property vested in them for the benefit of the owner of the property. The rule seems to me to be a rule of construction—a rule which lays it down that, in the particular case of a trust for the payment of creditors, the law will draw the inference that the intention of the donor or settlor was not to create a trust, but merely to give a revocable direction. The recitals in this deed shew that the trusts in question were not trusts for the payment of creditors, but were trusts for the purpose of making good a wrong of which the donor had been guilty; and it does not seem to me that such a trust ought to be regarded as a direction given by the owner of the property to his own agent for his own convenience, especially when it is remembered that the personal identity of the owner conveying, and the trustee of the estates in respect of which the breaches of trust have been committed, renders it convenient that Prance should in his character as trustee nominate some one to whom the estate should be conveyed for the purposes of the trust created. In my judgment, the whole of the recitals in the deed go to negative the intention of Prance to execute a revocable direction, and affirm his intention to create the relation of trustee and cestuis que trustent; and this seems to me confirmed by the power given to Hunting to appoint trustees in substitution for himself, and by the charge created for the carrying out of the trusts. I do not mean to say that the inference drawn in *Garrard* v. *Lord Lauderdale* (1) as to the intention of the donor cannot be drawn except in the case of trusts for the payment of debts; but it does seem to me that in all other cases it is a mere question of intention to be inferred from the contents of the deed and the surrounding circumstances; and in this case I have come to the conclusion that the intention was to create the relation of trustee and cestuis que trustent. Indeed, even if the deed ought to be regarded as a conveyance in trust for the payment of debts, so that in the absence of other considerations the rule in *Garrard* v. *Lord Lauderdale* (1)

(1) 3 Sim. 1.

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would apply, yet I think, even in the case of a conveyance for the benefit of creditors, that rule would not apply if the contents of the deed itself, and the surrounding circumstances as recited, negatived the intention that the owner of the property should be the cestui que trust, and affirmed an intention to create the relation of trustee and cestui que trust as between the trustee and other persons; and it seems to me that in the present case such is the real inference of intention, even though the cestuis que trustent of the trust estates ought to be considered as creditors within the rule of *Garrard* v. *Lord Lauderdale*. (1)

Then, as to the fraudulent preference, I think that the cases of *Ex parte Stubbins* (2) and *Ex parte Taylor* (3), reluctantly followed in *Ex parte Ball* (4), leave me no choice but to find that there was no creditor preferred. And even if these decisions were not conclusive of the case (which I think they are), I should find that the conveyance was not made with the view of preferring a creditor, but were made to repair breaches of trust, and not by way of fraudulent preference. I have only to mention that I think Mr. Mackenzie's contention that the view of fraudulent preference was evidenced by the selection of some trust estates to the exclusion of others failed in fact.

Now, I want to add here one or two words with regard to the proper mode of the application of s. 48 of the Bankruptcy Act, 1883. Lord Bowen, in *Ex parte Griffith* (5), pointed out that what has to be ascertained is, not the motive of the bankrupt, but the view with which the act complained of was done. Now, it is very easy to confuse "motive" and "view." In fact, it is so easy to confuse motive and view that there are numberless words in the English language which have a double or equivocal meaning, and are sometimes used to express motive and sometimes used to express view. Let me illustrate by an example what I consider to be the difference between the meaning of these two words, and the meaning of the word

(1) 3 Sim. 1.
(2) 17 Ch. D. 58.
(3) 18 Q. B. D. 295.
(4) 35 W. R. 264.
(5) (1883) 23 Ch. D. 69.

"view" in this section. I do not assent to the suggestion that "view" means the primary result aimed at. If "view" meant the primary result aimed at, every case would fall within s. 48, in which it was proved that, in fact, a creditor was preferred, and that the preference of that creditor was the necessary result of the act done by the bankrupt. It seems to me plain that this is not the meaning of the statute. The word "view," as used in the section, is used to express the object aimed at by the bankrupt in bringing about the primary result. Now, although motive is not the thing that we are to look for, but view, it is plain, as was pointed out by Lord Esher in *Ex parte Taylor* (1), that ascertaining the motive will very often assist you in determining what is the view. Suppose a case where the question was whether a man set fire to his house with the intention to injure his landlord, or the intention to defraud an insurance company. In such a case, in my judgment, setting fire to his house would be the primary object of that which he does, but that would leave open the question whether he aimed at or effected that object with a view to injure his landlord, or with a view to defraud the insurance company. Now, in order to ascertain that, you would be much assisted by ascertaining what his desire was, that is, what the motive was that induced him to set fire to his house. You would have to take into consideration all the circumstances of the case. If you found that he was over-insured, that would be a strong piece of evidence to shew that his view in setting fire to his house was to defraud the insurance company. If, on the other hand, you found that he was not over-insured, but that he was angry with his landlord for having given him a notice to quit, that would be a strong piece of evidence to shew that his view was not to defraud the insurance company, but to injure his landlord. And in the same way, in bankruptcy, you have got the payment of the creditor, which is equivalent to the analagous case that I have taken of setting fire to the house. With what view did the debtor make the payment to the creditor? Did he make the payment to the creditor from a sense of duty, or from

(1) 18 Q. B. D. 295.

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a sense of favour or kindness towards the creditor? So here, the mere fact that there had been a breach of trust, and that, therefore, it was possible that he should make the payment from a sense of duty, is by no means conclusive. There might be other facts, such as connection in blood to the cestuis que trustent, which might suggest that the dominant view was not to repair the wrong done, but to favour his relatives. Now I think I have said enough to shew the principle which I have applied in this case in so far as it is necessary to apply it. I have already said that I think the case is concluded by other considerations; but, assuming that it is not, I have sought to express the principle which I have applied in determining this case. In my judgment, if you look at the facts of this case, there is most ample evidence to shew that the debtor might have been impelled in the absence of other evidence, probably was impelled, to make the conveyance, that is really to make the payment to the creditor, from a sense of duty; and I see no evidence whatever in this case of any circumstances to lead me to the conclusion that he made the conveyance from a sense of kindness towards the cestuis que trustent. In my judgment, therefore, if the question of fraudulent preference does arise by reason of the persons preferred being in the category of creditors, the right conclusion here is that this particular conveyance was made with a view, not of preferring the creditors, but of repairing the wrong done, and I am assisted in arriving at that conclusion by a consideration of the motives which the evidence shews that the bankrupt had.

Solicitors for plaintiff: *Burton, Yeates & Hart.*

Solicitors for defendants: *Rowcliffes & Co.; M. H. Prance; R. White.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
1897
Jan. 12.

ROBINSON *v.* THE MAYOR AND CORPORATION OF THE BOROUGH OF WORKINGTON.

Local Government—Sewers—Duty of Local Authority to make Sewers—Remedy for Default—Action for Damages—Complaint to Local Government Board—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 19, 299.

The duty of a local authority, under s. 15 of the Public Health Act, 1875, to make such sewers as may be necessary for effectually draining their district for the purposes of the Act, can only be enforced by complaint to the Local Government Board under s. 299 of the Act, and neglect of the duty does not give a right of action to an individual whose property has been injured by such neglect.

APPEAL from a judgment of Cave J. at the trial of the action with a jury.

This was an action to recover damages for injuries sustained by the plaintiff by reason of the insufficiency of certain sewers, the property of the defendants, to carry off the sewage which passed through them. It was admitted at the trial that the claim was founded on non-feasance in that the defendants had not constructed a sewer in the place of the existing one of sufficient dimensions to carry off the sewage of the district in which the property of the plaintiff was situated. The sewer had been sufficient for the district in which the plaintiff's houses were situated until a number of new houses were built which drained into the sewer, which thereby became inadequate to carry off all the sewage, some of which was bayed back, and overflowed into the plaintiff's houses, and caused the injury complained of. The learned judge directed a verdict for the defendants, on the ground that the only remedy of the plaintiff in such a case was to proceed under s. 299 of the Public Health Act, 1875, or to apply for a mandamus.

The plaintiff appealed.

A. Henry, for the plaintiff. The defendants, under s. 15 of the Public Health Act, 1875, are bound to supply sufficient

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sewers for their district, and by their neglect of this duty the plaintiff has suffered special damage for which he can maintain an action. This is not like the case of a highway, where the exemption of the highway board from liability for non-feasance arises from the fact that the duty of repairing is on the parish. In *Blackmore* v. *Vestry of Mile End Old Town* (1) the defendants were held liable, not as surveyors of the highway, but as owners of the defective meter in the highway. So here, the defendants are owners of the defective sewers, and are liable for damage resulting from their condition. This is not a complaint as to insufficient sewerage of the whole district, as to which application could be made under s. 299, and that section does not apply to the case of injury suffered by individuals. [He cited *White* v. *Hindley Local Board* (2); *Borough of Bathurst* v. *Macpherson* (3); *Mersey Docks Trustees* v. *Gibbs* (4); *Touzeau* v. *Slough Urban District* (5); *Kershaw* v. *Taylor*. (6)]

Bigham, Q.C. (*Mattinson, Q.C.*, and *Sylvain Mayer* with him), for the defendants. The only duty of the defendants arises under the Public Health Act, 1875, and the remedy for neglect of that duty is under s. 299. As the remedy is given by the statute that creates the liability, it is the only remedy, and no action will lie. The duty is not towards individuals but to the public, and the principle laid down in *Glossop* v. *Heston and Isleworth Local Board* (7), that no action will lie against a local board for an actionable nuisance, where they have done no act to create or increase it, is applicable. [He cited also *Cowley* v. *Newmarket Local Board* (8) and *Thompson* v. *Mayor of Brighton*. (9)]

A. Henry, in reply.

LORD ESHER M.R. In my opinion, this appeal fails. The first thing to consider is, what was the complaint? The learned

(1) (1882) 9 Q. B. D. 451.
(2) (1875) L. R. 10 Q. B. 219.
(3) (1879) 4 App. Cas. 256.
(4) (1866) L. R. 1 H. L. 93.
(5) (1896) 60 J. P. 103.
(6) [1895] 2 Q. B. 471.
(7) (1879) 12 Ch. D. 102.
(8) [1892] A. C. 345.
(9) [1894] 1 Q. B. 332.

counsel for the plaintiff tried to alter it to something not relied on at the trial, and which the evidence does not support. He tried to put the case on non-repair of the sewer; but there is no evidence to raise any such question. It is obvious that the drains were efficiently built, and were not out of repair. There is no evidence to support the action on this ground, and the real complaint is that the defendants had not caused to be made such sewers as were necessary for effectually draining their district. Whether, as has been suggested, this obligation relates to sewers for draining the whole district, I do not say; but assuming that the case can be brought within s. 15 of the Act, and that the defendants are in default, that is an act of non-feasance on their part, and not an act of misfeasance.

If it were not for the statute, there would be no duty on the defendants to do anything in the matter, and a default on their part is dealt with by a remedy provided by the same statute. I have no hesitation in saying that that is the only remedy which is available. It has been laid down for many years that, if a duty is imposed by statute which but for the statute would not exist, and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy. The remedy in this case is under s. 299, which points directly to s. 15, and shews what is to be done for default of the duty imposed by that section. That is not the remedy sought for in this action, which is brought to recover damages.

In my opinion, if the statute had dealt with acts of misfeasance, and had given a remedy, that would have been the only one available. But no section deals with a remedy for misfeasance, and it follows that for this there may be a remedy outside the statute. The decision in *Glossop* v. *Heston and Isleworth Local Board* (1) seems to me to be precisely in point; and Lord Herschell's judgment in the House of Lords in *Cowley* v. *Newmarket Local Board* (2) is exactly applicable to the present case, and is an authority binding on us. I should have been of the same opinion without authority, but with that authority it seems to me our duty is clear, and we must say that the learned judge was right in directing a

(1) 12 Ch. D. 102. (2) [1892] A. C. 345.

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verdict for the defendants. The appeal must therefore be dismissed.

LOPES L.J. I am of the same opinion. It is important in the first place to consider what is the complaint of the plaintiff, and under what section of the statute it arises. In my judgment it arises under s. 15, and is this: that the defendants, as local authority, have not made the sewers which are necessary to effectually drain their district.

It is clear that up to 1889 the drainage was sufficient; but in that year new houses were built, larger demands were made upon the drains conveying the sewage, and the result was that that which was sufficient before became insufficient. It was admitted at the trial that the plaintiff's case was one of non-feasance. There would be no duty on the part of the defendants unless it had been created by the statute, and the duty so created is to the public or, to use the words of James L.J. in *Glossop* v. *Heston and Isleworth Local Board* (1), towards the district, and not to an individual. In such a case the law in my opinion is clear that no right of action is given to an individual against a public body in respect of an act of non-feasance. I think, speaking only for myself, that, independently of any express provision of the Act of Parliament, there would be no right of action; but when we find, in the same Act of Parliament which creates the duty, a remedy given for non-feasance, it is abundantly clear to my mind that there can be no action by an individual. The special remedy in this case is given by s. 299, by application to the Local Government Board, who have power to direct that an inspection should be made, and if necessary to order that the work shall be done. There is thus a special remedy given by the Act of Parliament; and it seems to me that it would be strange if, this being so, an individual were to have a right of action in a case of non-feasance. There are insufficient sewers, and no doubt this may affect private individuals; but it also affects the whole district. If there is a right of action in individuals affected, there might be a number of actions in which they might obtain damages,

(1) 12 Ch. D. 102.

and put the money in their pockets, but the mischief might still remain. On the other hand, the Legislature has enacted that in such a case the Local Government Board, upon proper representation, may interfere, and direct that to be done which will set things right in the whole locality, and make the sewage of the district that which it ought to be.

I am unable to distinguish this case from *Glossop* v. *Heston and Isleworth Local Board* (1), which seems to me to be in point and to cover this case. In *Cowley* v. *Newmarket Local Board* (2) the same principle is enunciated; and in *Sanitary Commissioners of Gibraltar* v. *Orfila* (3) the liability of a public body is put thus: "But in the case of mere non-feasance no claim for reparation will lie, except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the commissioners a duty toward himself, which they negligently failed to perform." This statute does not shew any duty created towards any individual, but it gives a special remedy to the locality at large.

I think that the judgment was right, and should be affirmed.

CHITTY L.J. I also think the appeal fails. The gist of the action is the non-performance of a statutory duty imposed by the Public Health Act, 1875. Two sections are relied on in support of the appeal. The first is s. 15. It has been already pointed out that there was no question of non-repair of the existing sewer, and no evidence to shew that it was not in a proper condition. In fact, the complaint made was that the sewage was backed by reason of the insufficient capacity of the sewer. The remedy for this would be the execution by the defendants of new works, and consequently the argument proceeded upon the second portion of the section—that which relates to the causing to be made such sewers as may be necessary for effectually draining the district. The answer to that ground of complaint is that it is provided for by s. 299. The execution of new works which is involved in such a case

(1) 12 Ch. D. 102.
(2) [1892] A. C. 345.
(3) (1890) 15 App. Cas. 400, at p. 411.

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may necessitate and, for anything I know to the contrary, would necessitate the purchase of additional land. Under s. 176 the local authority has no power to take lands compulsorily without going through the proceedings there mentioned.

As to s. 19, the argument upon it was practically abandoned, and I think rightly so. The section enacts that "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." It is said that these sewers were not properly "kept," that word being singled out, and that they were a nuisance; but this, in my opinion, does not assist the plaintiff, because there was no ground of complaint as to the keeping, in any reasonable sense of the term, of the sewers which belonged to the defendant.

Appeal dismissed.

Solicitors for plaintiff: *Wood & Wootton, for T. Milburn, Workington.*

Solicitors for defendants: *Tatham & Proctor.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1897 *March* 18.

PEEBLES *v.* THE OSWALDTWISTLE URBAN DISTRICT COUNCIL.

Local Government—Sewers—Duty of Local Authority to make Sewers—Remedy for Default—Mandamus—Complaint to Local Government Board—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 299.

The duty of a local authority, under s. 15 of the Public Health Act, 1875, to make such sewers as may be necessary for effectually draining their district for the purposes of the Act, cannot be enforced by action for a mandamus, the only remedy for neglect of the duty being that given by s. 299 of the Act by complaint to the Local Government Board.

Decision of Charles J., ante p. 384, reversed.

Appeal from the judgment of Charles J., reported ante, p. 384, where the facts are fully stated.

The defendants were the local authority for the urban district of Oswaldtwistle, and the plaintiff was a paper manufacturer, and owner and occupier of a paper mill within the district. The plaintiff claimed a mandamus commanding the defendants to cause to be made such sewers as might be necessary for effectually draining their district for the purposes of the Public Health Act, 1875, and to give facilities for enabling the plaintiff to carry the liquid proceeding from his factories or manufacturing processes into the sewers under their control. There was also a claim by the plaintiff founded on the Rivers Pollution Prevention Act, 1876; but the learned judge decided against this claim, and on this point there was no appeal. The learned judge decided that the plaintiff was entitled to a mandamus, and gave judgment accordingly. (1)

The defendants appealed.

Joseph Walton, Q.C., and *Danckwerts*, for the defendants. The learned judge was wrong in holding that the action for a mandamus to make sewers was maintainable. The Public Health Act, 1875, imposed the duty to make sewers on the

(1) Ante, p. 384.

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local authority, and gave a complete remedy for non-fulfilment of that duty by complaint to the Local Government Board under s. 299. That remedy is exclusive on the well-settled principle that, where a statute creates a duty and gives a specific remedy for non-performance of it, that is the only remedy. This case is concluded by the decision in *Robinson* v. *Workington Corporation.* (1)

It is also a rule that the Court will not grant a mandamus when there is another effective remedy.

[They also cited *Wolverhampton Waterworks Co.* v. *Hawkesford.* (2)]

Bigham, Q.C., and *C. A. Russell, Q.C.*, for the plaintiff. Sect. 299 of the Public Health Act is not an exclusive remedy as contended. Nor is it an appropriate or effective remedy in this case, where the question is really one of law, namely, whether the defendants are bound to make sewers to carry off liquids which are the result of manufacturing processes; and the Local Government Board were not intended to have, under that section, power to deal with questions of law. When the question of the liability of the defendants to carry away this effluent is determined, the questions of fact arising from that duty can be referred for determination to the Local Government Board. The section is one of a group of sections dealing with the duties of the Local Government Board, who are invested with supervision over the local authorities. It does not purport to give a remedy by which the duty imposed by s. 15 may be enforced by parties interested. The observations made in *Robinson* v. *Workington Corporation* (1), upon which the defendants rely, were not really necessary to the decision. The actual decision was only that an action for damages would not lie in respect of non-fulfilment by a local authority of the duty to make sewers. That case is merely one of the well-known class of cases of which *Atkinson* v. *Newcastle Waterworks Co.* (3) is a leading example. It should take more to shew that the ordinary remedy for enforcing a public duty is excluded than to shew that a private action for damages is excluded.

(1) Ante, p. 619. (2) (1859) 6 C. B. (N.S.) 336.
(3) (1877) 2 Ex. D. 441.

The rule of law with regard to the prerogative writ of mandamus is that it will lie unless there is another specific remedy by which the subject will get justice by a judicial decision of the Courts. See per Brett M.R. in *In re Nathan*. (1) The application to the Local Government Board is not such a remedy. James L.J. seems to have been of opinion that there was a remedy by mandamus in such a case as this, notwithstanding the provisions of s. 299. See *Glossop* v. *Heston and Isleworth Local Board*. (2) The same considerations apply to the action for a mandamus as to the prerogative writ.

Danckwerts, in reply.

LORD ESHER M.R. In this case the plaintiff is a manufacturer within the district of which the defendants are the local authority, and he seeks by mandamus to compel the defendants to make sufficient sewers to carry off the liquid proceeding from the factories or manufacturing processes. It is said that the only question raised is one of law; but I do not think that can be truly said, because many other points than the mere obligation to carry away this particular liquid are raised by the action, and I do not think that those points can be separated from the point of legal liability. The answer given by the defendants to the plaintiff's action is that the liability to make sewers for their district is imposed on them by statute, and that before the statute there was no such liability. It is then said that there is a remedy provided by the statute for breach of the duty, and that the case comes within the canon of construction that if a new obligation is imposed by statute, and in the same statute a remedy is provided for non-fulfilment of the obligation, that is the only remedy. It was in obedience to that rule of construction that *Robinson* v. *Workington Corporation* (3) was decided by this Court. It is true that in that case an individual brought an action for damage he had sustained by reason of the non-performance of the duty imposed by s. 15 on the local authority, while here the plaintiff asks for a mandamus to compel them

(1) (1884) 12 Q. B. D. 461, at p. 475.

(2) (1879) 12 Ch. D. 102, at p. 115.

(3) Ante, p. 619.

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to perform their duty; but the reasoning is equally applicable to both cases. Neither of the remedies sought is that given by the statute under s. 299; and consequently, following the rule I have stated, neither action can be maintained.

It is said this action is maintainable because there is a question of law in dispute, and that it is only that question which is in dispute. This is incorrect, for the plaintiff has not brought this action merely to determine whether the defendants are bound to take away the liquid from his factories, but to enforce the making of sewers, and doing the work necessary to carry it away. If a question of law is raised on such an application, can the plaintiff pass over the remedy given by the statute and come to a court of law to have it determined? Assuming that the Local Government Board would have, on an application under s. 299, to decide a question of law, I do not hesitate to say that comes within their jurisdiction. It is not necessary to decide to-day what is the extent of the powers of the Local Government Board; but, be they as large as they may, I do not desire by anything that I say to put any limit on them.

I cannot agree with the conclusion arrived at by the learned judge, and the appeal must be allowed.

LOPES L.J. The plaintiff has brought an action against the defendants, as an urban sanitary authority, for a mandamus, which has been granted by the learned judge, directing the defendants in the terms of s. 15 of the Act "to cause to be made such sewers as may be necessary for effectually draining their district under the Public Health Act, 1875, and in particular the plaintiff's premises in the pleadings mentioned." It is said that this action will not lie because, by s. 299 of the same Act, there is a special remedy provided for the defendants' breach of duty. In my opinion, s. 15 does not create any duty towards any particular individual, and s. 299 gives a specific remedy for the benefit of the locality at large. The existence of this specific remedy brings the case within the rule that, where a new obligation is created by statute, and a specific remedy is provided for infringement of the duty, that statutory remedy is the only one. That principle is laid down in a number of

cases, of which I will mention three: *Doe* v. *Bridges* (1), *Stevens* v. *Jeacocke* (2), and *Marshall* v. *Nicholls*. (3)

That being so, it appears to me that this action will not lie. I am unable to distinguish this case from *Robinson* v. *Workington Corporation* (4), and I adhere to the views which I there expressed, and which I think are applicable to the present case.

One point taken is that there may be a question of law arising; but I cannot see that that makes any difference. If any such question arises it must be dealt with, and is intended to be dealt with, in the same way as any other question which comes before the Local Government Board for consideration. If the Board exceed their jurisdiction, no doubt their order might be brought up upon certiorari, and, if the case were made out, the order might be quashed. But so far as any question of law is concerned, I think it was the intention of the Legislature that that, as well as other matters, should be dealt with by the Local Government Board, and it is to be recollected that they have the fullest opportunity of obtaining the very best legal advice if they are in any difficulty in regard to a question of law.

I think the appeal ought to be allowed.

CHITTY L.J. Thinking as I do, that this case is covered by the decision in *Robinson* v. *Workington Corporation* (4), and as the points have been so fully dealt with, I will only add a few words.

The plaintiff has obtained a decision that he is entitled to a mandamus founded upon the second part of s. 15 of the Public Health Act, 1875, and practically in the same terms. The duty which was imposed upon local authorities by that section was a new duty imposed on a statutory body, and the rule which has been referred to would apply if there is a particular and special remedy to be found in the statute itself. I think s. 299 does supply such a remedy, and therefore the rule upon which we acted in the case I have mentioned applies. It has been said that the Local Government Board is not a judicial

(1) (1831) 1 B. & Ad. 847.
(2) (1848) 11 Q. B. 731.
(3) (1852) 18 Q. B. 882.
(4) Ante, p. 619.

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body, but it is the tribunal appointed by the Act which imposes the duty on local authorities. Looking at the objects and provisions of the Act, the Board is the kind of tribunal which is most competent to discharge this particular duty of ascertaining whether the sewers of any given district effectually drain it for the purposes of the Act.

I agree in thinking that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Soames, Edwards & Jones.*

Solicitors for defendants: *Pritchard, Englefield & Co., for Charles Costeker, Darwen.*

A. M.

1897 *March* 13.

THE QUEEN *v.* COMMISSIONERS OF LUNACY.

Lunatic—Custody—Discharge—Certificate of Medical Practitioners—Discretion of Commissioners—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 49.

The Commissioners of Lunacy have a discretion to refuse to order the discharge of a lunatic from detention notwithstanding the production to them of the certificates of two medical practitioners certifying under s. 49 of the Lunacy Act, 1890, that the lunatic may be discharged without risk of injury to himself or the public.

RULE for mandamus to the Commissioners of Lunacy to issue an order under s. 49 of the Lunacy Act, 1890, to discharge one Robert Charles Cockerill from further detention under a reception order.

On March 12, 1895, Robert Charles Cockerill, a captain in Her Majesty's Army, was certified by two medical men to be insane, and on March 18 was removed under an urgency order to the Holloway Sanatorium, Virginia Water, an institution for the reception of lunatics. On March 19 a reception order was made, and under that order he continued to be detained. On January 9, 1897, the solicitors acting for Captain Cockerill wrote to the Commissioners of Lunacy alleging that the facts indicating insanity observed by the medical men in March, 1895, no longer existed, that except so far as he had certain

strange views on the subject of religion he was rational, and would be harmless to himself and the public if released; and they applied on his behalf for an order under s. 49 (1) of the Lunacy Act, 1890, for his examination by two medical practitioners. The commissioners on January 14 made the order asked for, authorizing the examination of Captain Cockerill by two named medical practitioners: and in pursuance of that order the said medical practitioners examined him, and on January 28 and 29 respectively certified that they had examined him on two separate occasions, with at least seven days intervening, and that in their opinion he might be discharged without danger to himself or the public. Notwithstanding the said certificates, the commissioners, having made independent inquiry into the case of Captain Cockerill, declined to make an order for his discharge.

A rule nisi for a mandamus to the commissioners to order his discharge having been obtained at the instance of Captain Cockerill,

H. Sutton, for the commissioners, shewed cause. The discretion of the commissioners under s. 49 to order or refuse to order the discharge of a lunatic is absolute. The word "may" in an Act of Parliament never means "shall," though sometimes the context in which that word is found imposes upon the party upon whom the power is conferred a duty to exercise that power. There is nothing in the context in s. 49 to create any such duty. The scheme of the Act was to give to the commissioners wider powers in the matter of the discharge or detention

(1) By s. 49 of the Lunacy Act, 1890, "An order for the examination by two medical practitioners, authorized by the commissioners, of any person detained as a lunatic in any institution for lunatics, or as a single patient, may be obtained from the commissioners upon the application of any person, whether a relative or friend or not, who satisfies the commissioners that it is proper for them to grant such order; and on production to the commissioners of the certificates of the medical practitioners so authorized, certifying that after two separate examinations with at least seven days intervening between the first and the second examination they are of opinion that the patient may, without risk or [*sic*] injury to himself or the public, be discharged, the commissioners may order the patient to be discharged at the expiration of ten days from the date of the order."

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of lunatics than to other persons. Under s. 74 they may override the opinion of the medical officer of an institution for lunatics, and, if they think proper, discharge a lunatic notwithstanding that such officer may have certified the lunatic to be dangerous. Under s. 78 the power given to visitors of licensed houses to discharge lunatics does not apply to lunatics so found on inquisition, whereas under ss. 49, 75 the commissioners may discharge a lunatic whether so found or not.

W. Graham, for the mother of the applicant, appeared on the same side.

H. Tindal Atkinson, in support of the rule. The production to the commissioners of a medical certificate under s. 49 makes it obligatory on them to grant the discharge. They must satisfy themselves that there is a primâ facie case for a discharge before they authorize the medical men to examine the patient. In granting the medical men the authority to examine him, they delegate to them the duty of determining whether the case is made out. From that point they become functi officio so far as the exercise of discretion is concerned. Sect. 49 is the only section in the Act which provides for a discharge on the application of the party detained himself. If the patient satisfies the conditions of that section by procuring the certificate of two medical men, there arises a duty in the commissioners to discharge him: *Julius* v. *Bishop of Oxford*. (1)

CAVE J. I am of opinion that this rule must be discharged. It is quite clear that by s. 49 of the Lunacy Act, 1890, under which the application was made, the commissioners may order the discharge of a patient upon the production to them of the certificate there mentioned; but what Mr. Tindal Atkinson contended for was that the section not only empowers them to make such an order, but requires them to make the order. With that contention I cannot agree. The management of lunatics is in a great measure committed to the commissioners, and it would be an extraordinary construction of the Act to hold that the Legislature, after having taken elaborate precautions to secure through the commissioners the proper care

(1) (1880) 5 App. Cas. 214.

and custody of lunatics, should by a single stroke of the pen supersede the commissioners altogether in favour of two medical practitioners with regard to whose selection no rules whatever are laid down. Such medical practitioners are not required to be persons of exceptional eminence or ability, or indeed to have any knowledge or experience of lunacy at all. All that is required of them is that they should be authorized by the commissioners to examine the patient. And it is said that upon the mere production of a certificate of two such men, certifying that the patient may be safely discharged, all discretion is taken away from the commissioners, and they are bound to order the discharge. I do not think the Legislature can have intended such a result. In my opinion the contention that the section not only confided to the commissioners a power, but also imposed on them a duty, fails. If, then, there is only a power confided to them, it is one which they must exercise at their discretion; and I cannot accede to the view that that is a discretion of a kind which can be brought here for examination before judges who have no experience in matters of lunacy.

GRANTHAM J. I am of the same opinion and for the same reasons.

Rule discharged.

Solicitors for applicant: *Robbins, Billing & Co.*
Solicitor for commissioners: *Solicitor to the Treasury.*

J. F. C.

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March 30, 31.

[IN THE COURT OF APPEAL.]

CARNEY *v.* PLIMMER.

Gaming—Agreement by way of Wagering—Loan of Money to pay Deposit—Condition for Repayment on Winning Stakes—Right to recover Loan—Gaming Act, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.

The Gaming Act, 1892, enacts that any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered void by the Gaming Act, 1845, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

The defendant entered into a wagering contract with a third party and money was paid by the plaintiff at the request of the defendant to a stakeholder to abide the event of the wager. The money was to be repaid by the defendant if he received the stakes, which he did. In an action to recover the money:—

Held, that the payment made by the plaintiff to the stakeholder was made in respect of a contract made void by the Gaming Act, 1845, and the contract to repay it was within the terms of the Gaming Act, 1892, and was void.

APPEAL from the judgment of Day J. at the trial of the cause without a jury.

The action was brought to recover a sum of 500*l.* under the following circumstances. The defendant and a man named Corfield agreed to a boxing-match for 500*l.* a side, and the defendant applied to the plaintiff to advance him the money to deposit. The plaintiff agreed to do so, and paid the sum of 500*l.* to the stakeholder appointed by the parties. Corfield also deposited with the stakeholder 500*l.*, and added money to the extent of 400*l.* was also deposited. The boxing-match came off, and was won by the defendant, who received from the stakeholder the sum of 1400*l.* The plaintiff applied to the defendant for repayment of the 500*l.* deposited, and, failing to obtain it, brought this action. The defendant pleaded that the contract to repay the money was void under the Gaming Act, 1892. (1) The plaintiff was called at the trial, and said

(1) 55 & 56 Vict. c. 9, s. 1: "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the eighth and ninth Victoria,

that if the defendant won the match the money was to be repaid, but that he did not expect that he should receive the money back if the defendant lost. The learned judge gave judgment for the plaintiff.

The defendant appealed.

March 30. *Hugo Young*, and *McCardie*, for the defendant. This case comes within the Gaming Act, 1892. In the first place, the wager between the defendant and his opponent was null and void, and by the Gaming Act, 1845, s. 41, no suit could have been brought by the winner to recover the money deposited. The plaintiff paid a sum of money in respect of that wagering agreement, and the promise to repay him is therefore void under the Gaming Act, 1892, s. 1. In *Tatam* v. *Reeve* (1) it was held that money paid at the request of the defendant to persons to whom he had lost bets could not be recovered. In effect the decision was that money lent to pay bets that had been lost could not be recovered, and the same rule applies to money advanced to make bets or wagers.

[They also cited *Diggle* v. *Higgs*. (2)]

Alfred Lyttelton (*Dorsett* with him), for the plaintiff. The transaction between the parties was a loan, and the fact that the money lent was to be devoted to a wagering contract does not invalidate the antecedent contract of loan. In *O'Sullivan* v. *Thomas* (3) money was held to be recoverable by a person who had deposited it with a stakeholder, to abide the result of a race between the plaintiff and a third party, on the ground that it was not money paid under or in respect of a wagering contract within the Gaming Act, 1892. That ruling is applicable to the present case, in which the deposit was made, not by one of the principals to a wagering contract, but by an agent. [He also cited *De Mattos* v. *Benjamin*. (4)]

McCardie, in reply.

Cur. adv. vult.

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chapter one hundred and nine, ... shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

(1) [1893] 1 Q. B. 44.
(2) (1877) 2 Ex. D. 422.
(3) [1895] 1 Q. B. 698.
(4) (1894) 63 L. J. (Q.B.) 248.

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March 31. LORD ESHER M.R. I am sorry to be obliged to come to the conclusion that this appeal must be allowed.

The defendant and another man, as it appears, were to engage in a boxing-match for money. Each of them was to put down 500*l.*, and these two sums, with some added money, were to go to the winner. The other man put down his 500*l.*, but the defendant does not appear to have had the money to stake, and he asked the plaintiff to lend him 500*l.* This the plaintiff did; and on this part of the case I have no doubt whatever that there was a loan of the money by the plaintiff to the defendant. The defendant won the match, and received the two sums deposited, and the added money, but he refuses to repay the loan on the ground that the Gaming Act, 1892, says that he need not pay it. The Act says that any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, shall be null and void. That this loan was in respect of a matter rendered null and void by the Act of 1845 I cannot doubt, because the plaintiff's own evidence is that he lent the money on the terms that if the defendant won he was to repay it, but that if he lost he was to be under no obligation to do so, so that the plaintiff was to be repaid or not according to the result of the wager. The appeal must therefore be allowed.

LOPES L.J. The facts of the case are these. Two men, of whom the defendant was one, were to engage in a boxing-match. Each was to deposit 500*l.*, and the two sums were to be handed to the winner. The other man deposited his 500*l.*; but the defendant had not the money, and the match would have gone off had not the defendant eventually got the money from the plaintiff, who deposited it with the stakeholder. The match then came off, and the defendant won, and received the two sums of 500*l.* each, and 400*l.* of added money. It cannot be doubted that there was a wagering contract between the two combatants, and that this contract was void by reason of the Gaming Act, 1845. The question that arises is whether the Gaming Act, 1892, applies to the contract made between

the parties to this action. Having regard to the words of s. 1 of that Act, I think it is impossible to say that the money paid by the plaintiff was not paid by him "in respect of a contract or agreement rendered null and void by the Act of the eighth and ninth Victoria, chapter one hundred and nine"; and that being so, the plaintiff cannot recover, and the appeal must be allowed.

CHITTY L.J. It is argued for the plaintiff that the contract between him and the defendant was a simple contract of loan, in which case the borrower would be bound to repay the money. Looking at the terms on which the plaintiff paid the 500*l.* to the stakeholder, it appears that the money was to be repaid by the defendant if he received the stakes from the stakeholder. In that event, and in that only, was the money to be repaid, and the contract was therefore not a simple contract for a loan. Put in a legal form, the contract may be thus stated: Money was paid by the plaintiff to the stakeholder at the request of the defendant, and on the terms that the defendant should repay it if and when he received it. There was no wagering contract between the plaintiff and the defendant, but there was such a contract between the defendant and the other party to the boxing-match. This latter contract was made void by the Gaming Act, 1845, and the payment made by the plaintiff to the stakeholder was, in my opinion, unquestionably a sum of money paid in respect of a contract made void by that Act. The contract to repay this money was therefore within the terms of the Gaming Act, 1892, and was made void by that Act. The plaintiff is not entitled to recover, and the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *East & Smith, Birmingham.*

Solicitors for defendant: *Judge & Priestley, for Philip Baker, Birmingham.*

A. M.

1897
March 30.

In re STEPHENSON.
Ex parte BROWN.

Bankruptcy—Voluntary Settlement—Damages recovered in the Divorce Court—Life Interest determinable on Bankruptcy—The Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47—*The Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 33.

In an action for divorce the husband was awarded by a jury 1500*l.* damages against the co-respondent, and this sum was paid into court. A settlement was then executed with the sanction of the Court to which the husband was a party, and by which the money was vested in trustees upon trust for the wife for life whilst chaste and unmarried, and then for the husband for life with a gift over in the event of his bankruptcy, which event happened:—

Held, that the damages were not "the property" of the husband within the meaning of s. 47 of the Bankruptcy Act, 1883, and consequently that the gift over of his life estate on bankruptcy was not void as against his trustee in bankruptcy.

THIS was an application which raised the question whether a life interest determinable on bankruptcy, contained in a voluntary settlement of damages recovered in the Divorce Court, was valid.

On December 8, 1895, H. Stephenson obtained in the Divorce Court a decree nisi for the dissolution of his marriage, and 1500*l.* damages and costs against the co-respondent. This sum and 388*l.* 8*s.* 8*d.*, the taxed costs, were in due course paid into court.

By deed dated March 6, 1896, and made between H. Stephenson of the first part, M. Stephenson (his wife) of the second part, and A. Stephenson and D. Anderson (trustees) of the third part, after reciting, amongst other things, the payment into court of the 1500*l.* and 388*l.* 8*s.* 8*d.*, and that the said H. Stephenson and M. Stephenson had agreed that the moneys so paid into court should (so far as they had power to regulate the application thereof) be applied in manner thereinafter expressed, it was thereby agreed that the moneys so paid into court should (after certain payments thereout) be paid to the trustees, and be invested and held upon trust to pay the income

thereof to the said M. Stephenson for life so long as she should remain chaste and unmarried; and upon the determination of that trust to pay the said income to the said H. Stephenson during his life, "or until some event shall happen whereby the said income or any part thereof, if belonging absolutely to him, would become vested in or payable to some other person or persons"; and in the event of the determination or failure of the last-mentioned trust, the trustees were to apply the said income for the benefit of the said H. Stephenson and his children in such manner as they should in their absolute discretion think fit. This settlement was made subject to the approval of the Court.

On May 18, 1896, the decree nisi was made absolute, and in the following June the settlement was sanctioned by the Court.

Soon afterwards a receiving order was made against H. Stephenson, and he was adjudged bankrupt. W. Brown was appointed the trustee in the bankruptcy, and now applied to the Court for a declaration that the gift over on bankruptcy of H. Stephenson's life interest under the settlement was void as against him, and that such life estate vested in him as such trustee in bankruptcy.

Muir Mackenzie, for the application. Although the Court has power under s. 33 of the Matrimonial Causes Act, 1857, to direct how the damages are to be applied (1), they are none the less the property of the husband. They are the sum awarded to him by the verdict of the jury, and, subject to any provision that the Court may direct to be made for the wife and children, the damages belong to him. He is the grantor in the settlement. The case falls within the principle stated in *Higinbotham* v. *Holme* (2); *Mackintosh* v. *Pogose* (3); and

(1) Sect. 33 of the Matrimonial Causes Act, 1857, enables a husband to claim damages from adulterers, and directs that the damages shall in all cases be ascertained by the verdict of a jury, and that "after the verdict has been given the Court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife."

(2) (1812) 19 Ves. 88.

(3) [1895] 1 Ch. 505, at p. 514.

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In re STEPHENSON. *Ex parte* BROWN.

the gift over of his life interest on bankruptcy is void as against his trustee in bankruptcy: *Ex parte Dawes* (1); *In re Ashby*. (2)

O. L. Clare, for the trustees of the settlement. This is an attempt to vary a settlement made under the order of the Divorce Court, which this Court has no jurisdiction to do. The damages were entirely within the control of the Divorce Court, and formed no part of the husband's estate. He could not have assigned the damages, nor presented a bankruptcy petition against the co-respondent in respect of them: *Ex parte Muirhead*. (3)

[He was stopped.]

VAUGHAN WILLIAMS J. I am of opinion that in this case the trustee must fail in his motion. It is quite plain that this case does not fall within the principle of *Higinbotham* v. *Holme*. (4) That case decides that where a person settles his own property in such way that his interest therein determines on his bankruptcy, that is evidence of an intention to defraud his creditors. But here that principle does not apply. The moment one sees that the money payable by the co-respondent does not belong to the husband, but that the Court, under s. 33 of the Matrimonial Causes Act, 1857, has power to direct how much, if any, shall be paid to the husband, and how much shall be applied for the benefit of the wife and children, it is impossible to say that the husband, who is made a party to the settlement sanctioned by the Court, is settling his own property by way of fraud on his creditors. The Court could have directed that the whole of the damages should be settled on the wife and children, and, if it had so directed, the husband could not have prevented it. The Court has thought fit here to direct that the life interest of the husband should, in the event of his bankruptcy, go over and be held upon the discretionary trust mentioned in the settlement. In my judgment a sum of money payable as damages by a co-respondent, and settled under the sanction of the Court, is a very different thing from a settlement

(1) (1886) 17 Q. B. D. 275.
(2) [1892] 1 Q. B. 872.
(3) (1876) 2 Ch. D. 22.
(4) 19 Ves. 88.

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by a man of his own property in such a way as that, should he become bankrupt, his interest therein becomes forfeited and goes over. Having said that, ought I to hold this settlement of damages under the direction of the Divorce Court is another instance of a man attempting to defraud his own creditors? I think not. It is the act of the Court. The motion must be dismissed with costs.

Solicitors for trustee in bankruptcy: *Spyer & Sons.*
Solicitor for trustees of the settlement: *G. Trenam.*

H. L. F.

In re JUBB. *Ex parte* BURMAN AND GREENWOOD.

1897 *April* 5.

Bankruptcy — Receiving Order — Refusal — Probability that Costs will exceed Assets — "Sufficient Cause" — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 3.

Where a bankruptcy petition is presented against a debtor, it is not sufficient cause, within the meaning of the Bankruptcy Act, 1883, s. 7, sub-s. 3, for refusing to make a receiving order, and dismissing the petition, that at the hearing it appears probable that the amount of the costs of bankruptcy proceedings will exceed the amount of the assets available for distribution.

In re Betts, Ex parte Betts, [1897] 1 Q. B. 50, distinguished.

APPEAL by the petitioning creditors from the order of the judge of the county court of Yorkshire, holden at Sheffield, refusing to make a receiving order against the debtor, and dismissing the creditors' petition.

The petitioning creditors' claim was in respect of the sum of 66*l.* 15*s.* for goods supplied. The act of bankruptcy stated in the petition was that the debtor had given notice to his creditors, or one or some of them, that he had suspended, or was about to suspend, payment of his debts.

The affidavit of the solicitor for the petitioning creditors, which was filed in support of the appeal, stated that at the hearing, on November 5, 1896, the debtor's solicitor objected to

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In re JUBB. *Ex parte* BURMAN AND GREENWOOD.

a receiving order being made, alleging that the debtor had offered a composition of 3*s.* 4*d.* in the pound to his creditors, and that 13*l.* had been paid by the debtor to two creditors of the debtor as a composition since the commission of the act of bankruptcy, but that the petitioning creditors, along with another creditor, had refused to accept such composition. The debtor's solicitor further stated that the 13*l.* comprised all the available assets of the debtor, and that there were now no assets which the official receiver could take possession of in case a receiving order were made, other than a book debt of 8*l.* The affidavit further stated that the county court judge dismissed the petition, on the ground that the debtor had no assets, and ruled that in his discretion a receiving order ought not to be made against the debtor.

The affidavit of the debtor and his solicitor referred to certain correspondence commencing September 16, 1896, on which date the debtor's solicitor wrote to the petitioning creditors: "His," the debtor's, "liabilities amount to about 130*l.*, and his assets consist of a debt due to him early in October of about 21*l.* You will see at once that there is not more than sufficient to pay the costs of bankruptcy. I desire the creditors to receive the full benefit of the small estate, and I am instructed to offer 3*s.* 4*d.* in the pound, payable on the 12th October next." This offer was not accepted by the petitioning creditors, and, after some further correspondence, the petition was filed on October 22, 1896.

The solicitor for the debtor in his affidavit denied the statement that the petition was dismissed on the ground that there were no assets, and stated that the ground on which the petition was dismissed was that the effect of a receiving order would be to swallow up the estate in costs, and leave nothing for the creditors, and that in his discretion the judge thought no receiving order ought to be made.

R. W. Harper, for the petitioning creditors, in support of the appeal. This is not a case in which the Court can properly be satisfied that for sufficient cause no order ought to be made, within the meaning of s. 7, sub-s. 3, of the Bankruptcy Act,

1883. (1) There is nothing in the special circumstances of the case, or in the conduct of the petitioning creditors, to point to the conclusion that the Court ought to hold that this is a case in which, in the exercise of the discretion vested in the Court, a receiving order ought to be refused.

Hansell, for the debtor, in support of the judge's order. This is not a case in which a receiving order ought to be made. It comes within s. 7, sub-s. 3, and there is sufficient cause for dismissing the petition. It is clear that if the bankruptcy proceedings go on the creditors will get less than if the proceedings are put a stop to, and this in itself is enough to induce the Court to exercise their discretion in favour of dismissing the petition, which is what the judge of the county court has done.

[The following authorities were referred to in argument: *Ex parte Robinson, In re Robinson* (2); *Ex parte Dixon, In re Dixon* (3); *In re Hecquard, Ex parte Hecquard* (4); *In re Otway, Ex parte Otway* (5); *In re Leonard, Ex parte Leonard* (6); *In re Betts, Ex parte Betts.* (7)]

[VAUGHAN WILLIAMS J. referred to *In re Birkin.* (8)]

R. W. Harper replied.

VAUGHAN WILLIAMS J. We think the decision of the county court judge was wrong. When the letters which are referred to in the affidavits were written, in September and October, 1896, there were assets. The debtor at that time wanted his creditors to accept a composition of 3*s.* 4*d.* in the pound. Two of the creditors accepted it, and were paid, but the present appellants refused to accept the composition, and filed a bankruptcy petition against the debtor. It is contended on behalf of the debtor that a receiving order ought not to be made. It is suggested on behalf of the appellants that the debtor opposed the making of a receiving order, on the ground that there were

(1) 46 & 47 Vict. c. 52, s. 7, sub-s. 3: "If the Court . . . . is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition."

(2) (1883) 22 Ch. D. 816.
(3) (1884) 13 Q. B. D. 118.
(4) (1889) 24 Q. B. D. 71.
(5) [1895] 1 Q. B. 812.
(6) [1896] 1 Q. B. 473.
(7) Ante, p. 50.
(8) (1896) 3 Manson, 291.

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no assets, and that the county court judge decided on that ground. This suggestion is denied by the respondent, and I accept that denial, for I do not see how the decision can have proceeded on such a ground, because in fact there were assets. I wish to state that I am not by any means satisfied that the creditors who have accepted the composition can hold the amount which has been paid to them as against the official receiver or the trustee in the bankruptcy. The question for our decision is, Why should there not be a receiving order? It is contended on behalf of the debtor that a receiving order ought not to be made, on the ground that in all probability the costs of the bankruptcy proceedings will exceed the sum of 20*l.*, which is alleged to be about the amount of the available assets, and so nobody will get anything. It has never been decided that the mere fact that the costs of the proceedings appear likely to absorb the whole of the assets amounts to a sufficient ground for the refusal of a receiving order. If that were so, many of the receiving orders which are made would have to be rescinded. It is contended on behalf of the respondent that the case of *In re Betts, Ex parte Betts* (1), is a decision which supports the proposition to which I have referred. But if that case is looked at, it is apparent that this was by no means the ground of the decision. It is true that Lord Esher M.R. in his judgment mentioned the fact that there was no probability or possibility in a business sense of the existence of assets, and pointed out that the result of making a receiving order would only be to cause a waste of money in costs which would be incurred uselessly. (2) But that was not the ground of the decision. The real ground was that, on the information which they had before them, the Court thought that there were no assets, and that there was no probability of there ever being any assets which would be available, because there was already a previous bankruptcy in existence, under which the debtor was still undischarged, and there was nothing in the circumstances of the case to prevent them from exercising their discretion by refusing to make a receiving order. For these reasons I have come to the conclu-

(1) Ante, p. 50.

(2) Ante, at p. 53.

sion that the decision of the county court judge was wrong. Sect. 7, sub-s. 3, of the Bankruptcy Act, 1883, provides that if the Court is satisfied that the debtor is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition. In the present case the order was based on the ground that there was sufficient cause for dismissing the petition, because at the hearing it appeared that there was a probability that the whole of the available assets would be absorbed by the costs of the bankruptcy proceedings; but that is not a ground for refusing to make a receiving order. It is quite possible that it may turn out in the course of the bankruptcy proceedings that the assets available for distribution are in fact larger than appears to be the case at present. The appeal must be allowed.

WRIGHT J. I entirely agree.

Appeal allowed.

Solicitor for appellants: *Mellor Lumb, for Wilmshurst & Stones, Huddersfield.*

Solicitors for respondent: *Steadman & Van Praagh, for Arthur Neal, Sheffield.*

P. B. H.

1897
March 15.

ARTER *v.* VESTRY OF HAMMERSMITH.

Metropolis—Management—"New Street"—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 112.

The mere fact that the maintenance of the paving and roadway of a road within the metropolis had not previously to 1862 been taken into charge by the highway authority of the parish is not enough to constitute the road a "new street" within the meaning of s. 105 of the Metropolis Management Act, 1855, and s. 77 of the Metropolis Management Act, 1862.

CASE stated by justices for the county of London.

The appellant is the owner of a house and land situate on the east side of a lane called Beavor Lane in the parish of Hammersmith. He is also the owner of the soil of the lane itself, which is about 164 yards in length. Such buildings as there are on the east side of Beavor Lane were all erected before 1855, and on that side there never has been any continuous line of building. On the western side of the lane there is a continuous row of buildings backing on to the lane, but none of them having any access or right of access to the lane. At what date the houses on the western side were built there was no evidence to shew. Between these last-mentioned buildings and the lane, and at a distance of a few inches from the boundary line of the said buildings, there runs along the whole length of the lane a fence, which fence together with the narrow strip of soil between it and the boundary line of the buildings are the property of the appellant. Along the eastern side of the lane there is a public footway which is paved. The rest of the lane is a private road, used as a private carriage-way to the appellant's house, and though members of the public have occasionally driven carts and carriages along it, they were, whenever discovered by the appellant in the act of so doing, charged a toll in respect of the passage. The respondents in June, 1895, gave notice to the appellant, as being the owner of a house and land bounding or abutting on the east side of Beavor Lane and of a strip of land bounding or abutting on the

west side, that they proposed to pave the new street called Beavor Lane, and that they, under the powers conferred by s. 105 of the Metropolis Local Management Act, 1855, and s. 77 of the Metropolis Local Management Act, 1862, required him to pay the sum of 295*l.* 11*s.* 4*d.* as his proportion of the expense of the paving. The appellant having neglected to pay the sum so demanded, the respondents preferred a complaint against him. At the hearing it was contended on behalf of the appellant that Beavor Lane was not a new street, and that even if it was he was not the owner of any land bounding or abutting on the street on its west side. The justices decided against the appellant on both contentions, and ordered him to pay the sum of 295*l.* 11*s.* 4*d.* Subsequently, in obedience to an order of the Court, they stated a case setting out the above facts, and asking the opinion of the Court as to whether there was any evidence to support their findings, and whether they were correct in law.

C. A. Russell, Q.C., and *John Mansfield*, for the appellant. Beavor Lane is not a new street. In no case has a road ever been held to be a street which was not either originally laid out as a street, or, being an old road, was converted into a street by the erection along at least one side of it of a more or less continuous line of buildings having access to the road. But this is neither of those cases. The houses on the west side, although continuous, have no access to the road. Even if this lane should come within the definition of a new street in s. 112 (1) of the Act of 1862 that is not enough to make it a new street

(1) By s. 250 of the Metropolis Local Management Act, 1855, "The word 'street' shall apply to and include any highway (except the carriageway of any turnpike road) and any road . . . . and a part of any such highway, road &c."

By s. 112 of the Metropolis Local Management Act, 1862, "The word 'street' shall be deemed to apply to and include the subject-matters specified in the two hundred and fiftieth section" of the Act of 1855; and "the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not previously to the passing of this Act been taken into charge and assumed by the . . . . authorities having control of the pavements or highways in the parish."

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for the purposes of the sections which throw the expense of paving on the frontagers: *Vestry of St. Mary, Battersea* v. *Palmer*. (1)

Macmorran, Q.C., and *Lowe*, for the respondents. This lane is directly within the definition of a new street in s. 112 of the Act of 1862, for it is a "street the maintenance of the paving and roadway whereof had not" previously to 1862 "been taken into charge and assumed by the . . . . authorities having control of the pavements or highways in the parish," every road being by virtue of s. 250 of the Act of 1855 "a street" for the purposes of the Metropolis Management Acts, whether it be a street in the ordinary acceptation of the term or not. Every section in those Acts in which the words "new street" occur must be read by the light of those definitions. The fact that the road is private is immaterial. The expression "new street" is not confined to roads dedicated to the public: *Vestry of St. Mary, Islington* v. *Barrett*. (2)

CAVE J. In this case we are asked two question: first, whether Beavor Lane was rightly held to be a new street; and, secondly, whether the appellant was the owner of land bounding or abutting on Beavor Lane throughout its entire length on the west side.

On the second question I say nothing beyond this, that there was some evidence on which the justices might come to the conclusion that the appellant had reserved to himself a strip of land on the far side of the road between the road and the houses backing on to it.

As to the first question, I am of opinion that the decision of the justices was wrong on this short ground. Beavor Lane was some sixty years or more ago a private road, and there is nothing to shew that anything has happened in the interval to alter its character. There is no evidence that the allowing of people to go along the road was anything new. No new houses were built with any access to the road. The only change that has taken place is that the neighbourhood has become more populous. The road has never been dedicated to the public.

(1) Ante, p. 220. (2) (1874) L. R. 9 Q. B. 278.

It is still an old road. It is neither new, nor is it a street. It is admitted that it is not within the primâ facie meaning of the words "new street." But it is contended that it comes within the definition of that term in s. 112 of the Act of 1862. That section provides that "'new street' shall apply to and include . . . . all streets the maintenance of the paving and roadway whereof had not previously to the passing of this Act been taken into charge and assumed by the . . . . authorities having control of the pavements or highways in the parish." By the same section it is provided that "the word 'street' shall be deemed to apply to and include the subject-matter specified in s. 250 of the firstly recited Act," namely, the Act of 1855. And s. 250 of that Act says that "'street' shall apply to and include . . . . any road." And it is said that consequently the definition of "new street" in s. 112 of the Act of 1862 must be read as applying to all roads the maintenance of which had not been taken over by the highway authority before the passing of that Act. No doubt if a piece of land were newly laid out for the purpose of being used as a street, and were not repairable by the public at large, it would be a new street although there were no houses along it. Or again, if an old road has houses built along its side with access to it, and thereby is converted into what is popularly understood by the term "street," it would be a new street within the Act. But here the road in question is neither. I am of opinion that you cannot by dovetailing these two definition clauses together cause every old road not repairable by the public in 1862 to be treated as a new street. The appeal must be allowed.

LAWRANCE J. I am of the same opinion.

Appeal allowed.

Solicitors for appellant: *Cunliffes & Davenport.*
Solicitors for respondents: *Watson, Sons & Room.*

J. F. C.

1897
March 16, 17.

OVERSEERS OF THE PARISH OF CRAYFORD AND OTHERS, APPELLANTS; D. & C. RUTTER, RESPONDENTS.

Local Government—Rates—Lighting Rates—Brickfield—"Land"—"Buildings and Property other than Land"—Lighting and Watching Act, 1833 (3 & 4 *Will.* 4, c. 90), s. 33.

By 3 & 4 Will. 4, c. 90, s. 33, "owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act" (lighting and watching).

The respondents occupied land, with engine-houses and other buildings upon it, for the purposes of a brickfield, the brick-earth being dug from a portion of the land and manufactured into bricks on other portions. All the land and buildings were used exclusively for the business of brick-making:—

Held, that—assuming that the buildings or any of them could not be rated apart from the land as being capable of being put to some other than their present use—the whole property was properly rated as "land" at the lower rate specified in the Act, and not at the higher rate as "buildings" or "property other than land."

SPECIAL CASE, stated by the Court of Quarter Sessions for the county of Kent on an appeal against a lighting and watching rate made for the parish of Crayford.

The following material facts were stated in the case:—

Prior to the making of the rate appealed against the Lighting and Watching Act of 1833 (3 & 4 Will. 4, c. 90) had been duly adopted for the parish of Crayford. The rate purported to assess the owners and occupiers of property other than land at 6*d.* in the pound, and the owners and occupiers of land at 2*d.* in the pound. (1) The present respondents were assessed at

(1) By 3 & 4 Will. 4, c. 90, s. 33, "The overseers . . . . shall, for the purpose of collecting, raising, and levying the rate necessary for the purposes of this Act, ... have the same powers, remedies, and privileges as for levying money for the relief of the poor in the said parish: Provided always, that owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act."

Sect. 34 provides that "it shall be

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6*d.* in the pound on certain property occupied by them in the parish, and described in the rate as "brickfields, land used for pipes, and other land." The respondents objected before the assessment committee of the Dartford Union, in which the parish of Crayford is, that they ought to have been assessed at the lower rate of 2*d.* in the pound as being occupiers of land, and not at the higher rate of 6*d.* in the pound as being occupiers of property other than land. Having failed to obtain the relief they desired from the assessment committee, they appealed to quarter sessions. The property in respect of which the assessment on the respondents had been made was described, by reference to a plan, in the case. It consisted of various plots of land separated from each other and containing in all about seventy-five acres. Paragraph 10 stated that "of the land included in the said assessment twenty-five acres was agricultural land, and the remainder was used and occupied, and all the works hereinafter described were used and occupied by the present respondents entirely for brickmaking." Paragraph 11 described the land and the buildings thereon used for brickmaking. The brick-earth was dug from the surface, and conveyed on tram-lines to wash-mills. At the time of the making of the rate all brick-earth used by the respondents for brickmaking was dug from one of the plots only, and after being treated at the wash-mills was conveyed by lines of pipes to another of the plots. On the plots were engine-houses with engines, coal-sheds, washing-mills, an open shed used as a wheelwright's shop and smithy, with an anvil and furnace used for repairing waggons, a stable (out of repair) for feeding horses, a one-floored cottage occupied by the respondents' foreman, clay-pits, and "moulder's huts," being a series of roofed buildings with open sides, in which the men employed by the respondents worked the mixing

lawful for the overseers . . . , and they are hereby required, whenever according to the rate made for the relief of the poor one and the same person shall be rated in one sum in respect of land and also of houses, buildings, and other property, to cause such land and also such houses, buildings, and other property to be separately assessed; and the sum hereby authorized to be levied shall be assessed accordingly."

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machines. Parts of the land used for brickmaking, and from which the brick-earth was not being dug, were used as "kiln ground" for burning the bricks after they had been made, and "hack ground" for drying the bricks. On one of the plots was a wharf constructed alongside a creek for the purpose of loading and unloading barges, which wharf at the time of the making of the rate was used for purposes of brickmaking only.

By the provisions of the leases under which the present respondents occupied their property they were entitled at the expiration or sooner determination of their term, to remove all iron and other tram-roads or railways, and all engines, pipes, and other machinery, and all buildings already erected, or thereafter to be erected, set up, and employed by them in and about the said premises, but not any portion of any wharves erected or built by them, or anything annexed thereto.

The Court of Quarter Sessions decided that the present respondents ought to be assessed at 2*d.*, and not at 6*d.*, in the pound, and that the rate should be amended accordingly.

The questions for the opinion of the Queen's Bench Division were:—

1. Is the whole property shewn on the plan, and occupied by the present respondents as or in connection with their brickfield, to be rated as land at the lower rate of 2*d.* in the pound?

2. Is the brickfield, with the buildings and machinery thereon, to be rated as property other than land at the higher rate of 6*d.* in the pound?

3. Are any, and if so what, portions of assessment described in paragraph 11 of this case to be rated as property other than land at the higher rate of 6*d.* in the pound?

If the Court should be of opinion that the first question should be answered in the affirmative, and the second and third questions in the negative, then the decision of the Court of Quarter Sessions is to stand.

If the Court should answer the second and third questions in the affirmative, then the order of the Court of Quarter Sessions is to be quashed, and this case remitted to the Court of Quarter Sessions for such Court to ascertain the amount on which the

present respondents should be assessed at the higher rate, having regard to such answers.

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Morton Smith, (*Hohler* with him), for the appellants. The overseers were right in rating the whole of the respondents' land and buildings used for brickmaking at the higher rate, as being "property other than land" within the meaning of s. 33 of the Lighting and Watching Act. "Property" in that section is not property ejusdem generis with houses and buildings. It must include the species of property other than land mentioned in 43 Eliz. c. 2, i.e., tithes, coal-mines and saleable underwoods, which are certainly not ejusdem generis with houses and buildings, though tithes have since been expressly taken out of the category of property other than land for the purposes of rating under the Lighting and Watching Act by 14 & 15 Vict. c. 50. In *Reg.* v. *Midland Ry. Co.* (1), decided under a local lighting Act, Lord Campbell C.J. (2) said that the intention of the Legislature probably was to exempt land used for the purposes of agriculture, and to rate hereditaments in which capital had been invested for habitation, or for purposes of profit from manufacturing or mechanical industry. In *Peto* v. *Parish of West Ham* (3) the majority of the Court held that a wet dock and basin with jetties and floating warehouses was property ejusdem generis with houses and buildings, and therefore liable to be rated at the higher rate under s. 33 of the Lighting and Watching Act, the dock, basin, jetties, and warehouses all forming an undertaking for profit in which a large capital had been invested. In *Reg.* v. *Overseers of Neath* (4) the Queen's Bench held that "property" in s. 33 meant things ejusdem generis with houses and buildings, and did not include a canal and towing-path with bridges and a dry dock, and they distinguished *Peto* v. *Overseers of West Ham*. (3) The Queen's Bench, in *Reg.* v. *Midland Ry. Co.* (5), followed *Reg.* v. *Overseers of Neath* (4), and held that a line of railway was "land" within the meaning of s. 33, and ought, therefore,

(1) (1855) 4 E. & B. 958.
(2) 4 E. & B. at p. 962.
(3) (1859) 28 L. J. (M.C.) 240.
(4) (1871) L. R. 6 Q. B. 707.
(5) (1875) L. R. 10 Q. B. 389.

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to be rated at the lower rate. This subject came before the House of Lords in *Thursby* v. *Churchwardens, &c., of Briercliffe-with-Extwistle* (1), with respect to the rating of coal-mines under s. 33. Their lordships held that, having regard to the statute of Elizabeth, coal-mines were not "land," but "property other than land," and were therefore rateable at the higher rate, though they could not derive any benefit from lighting and watching. They expressly dissented from the view that "property" in s. 33 was to be read in the limited sense of being confined to things ejusdem generis with houses and buildings. In the present case the subject of rating must be taken as a whole. It is property in which capital has been invested for the purpose of gaining profit by manufacturing bricks. The buildings and machinery are placed upon the land for that purpose, and they ought to be treated as the principal and the land as the accessory merely.

Secondly, if the whole property ought not to be treated as "buildings" or "property other than land," then it should be divided up for the purposes of rating under the Act. The house and the other buildings ought to be rated at the higher rate. This was done in *Newport Dock Co.* v. *Newport Local Board of Health* (2), where, in the rating of a dock, with warehouses and other adjuncts, under the Local Government Act, 1858 (21 & 22 Vict. c. 98), the warehouses, &c., were held to be rateable separately from the dock, and at the higher rate provided by the Act. A similar division, for the purposes of rating under the Public Health Act, 1848 (11 & 12 Vict. c. 63), was made in *South Wales Ry. Co.* v. *Swansea Local Board of Health.* (3) [He also referred to *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners.* (4)]

Dickens, Q.C. (*A. J. Hassall* with him), for the respondents. The decision of the House of Lords in *Thursby* v. *Churchwardens, &c., of Briercliffe-with-Extwistle* (1) is really conclusive in favour of the respondents. It disposes of Lord Campbell's

(1) [1894] 1 Q. B. 567; 2 Q. B. 11; [1895] A. C. 32.
(2) (1862) 2 B. & S. 708.
(3) (1854) 4 E. & B. 189.
(4) Ante, p. 287.

view in *Peto* v. *Parish of West Ham* (1) that "land" in s. 33 of the Lighting and Watching Act meant only agricultural land, and it establishes the true principle of construction to be applied to s. 33. Lord Herschell and Lord Watson say that "land" in s. 33 was intended to bear the same meaning as in the statute of Elizabeth, which provides that the rate shall be assessed on "every occupier of lands, houses, tithes, coal-mines, or saleable underwoods." Their Lordships held that coal-mines being expressly mentioned in the statute of Elizabeth were rateable as other "property" and not as "land" under the Lighting and Watching Act. E converso brickfields, being rateable as lands under the statute of Elizabeth, are rateable as lands under the Lighting and Watching Act. It is clear that brickfields could only be rateable as lands under the statute of Elizabeth; except as lands they could not be rated at all, because they are not houses, tithes, coal-mines, or saleable underwoods. In *Reg.* v. *Southwark and Vauxhall Ry. Co.* (2) the pipes of a water company were held rateable at the lower rate on the ground that the occupation of the pipes was an occupation of land. All the difficulties arising upon the cases cited for the appellants are done away with by the case in the House of Lords.

On the second point, it appears from the case that the house, engine-houses, sheds, and other buildings exist and are used only for the purposes of the brickfield. The brickfield is the principal and they are the accessories, and the property was rightly rated as a whole as land by the overseers. In *Reg.* v. *Midland Ry. Co.* (3) the buildings were treated as accessory to the line of railway.

Morton Smith, replied.

CAVE J. I am of opinion that the Court of Quarter Sessions came to a right decision upon the case as it stood before them, because they had only to deal with the assessment of the property as a whole, and, being rated as a whole, I think they were right in coming to the conclusion that it ought to be

(1) 28 L. J. (M.C.) 240. (2) (1856) 6 E. & B. 1008.
(3) L. R. 10 Q. B. 389.

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rated as land and not as buildings. The Act of Elizabeth provides that the subjects of rating for the relief of the poor shall be "lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwoods." So long as that Act alone had to be applied there was no necessity to distinguish between land and buildings, because buildings were rateable as land. Then came the Lighting and Watching Act of 1833, which provided that owners and occupiers of "houses, buildings and property (other than land)" should, for the purposes of that Act, be rated at a rate in the pound three times greater than that at which the owners and occupiers of land should be rated at. Considerable difficulty has arisen through the insertion of the word "buildings." But for that word the section would be easy to construe, because "other property" would include the tithes impropriate, propriations of tithes, coal-mines, and saleable underwoods mentioned in the statute of Elizabeth. The Lighting and Watching Act, however, has added the word "buildings," and that addition has made it necessary to consider whether the subject of rating, when it consists of land and of buildings which under the statute of Elizabeth were rated as land, ought to be rated at the lower rate as land, or at the higher rate as buildings. It is impossible not to see that the view taken by the judges has somewhat fluctuated upon this question. They have sought to find some satisfactory reason for the division made by the Lighting and Watching Act. At one time it was thought a good ground for the division to say that the Act intended that all land used for other than agricultural purposes should be rated at the higher rate, because it derived a benefit from being lighted and watched which purely agricultural land did not. That reason, however, clearly could not hold good, because by the Lighting and Watching Act coal-mines were to be rated at the higher rate, and coal-mines could derive no benefit whatever from lighting and watching. Again, saleable underwoods, being property other than land, were to be rated at the higher rate, and they, too, could not derive any such benefit. It is difficult to find a satisfactory principle for the division; but it is clear, at any rate, that when you have to deal with what under the statute

of Elizabeth was rateable as land, namely, land and buildings, you have now to go further, and see whether the subject of rating is really land or really buildings. If it is land, the lower rate applies; if buildings, the higher rate. When there are buildings alone, or land without buildings, no difficulty arises; but then comes the case in which the subject is both land and buildings—that is, land with buildings on it. Strictly the subject in such a case is not solely land, nor is it solely buildings, because it is composed of the two. In determining whether the subject ought to be rated as land or as buildings the question to be considered is, Is the land the principal, and are the buildings the accessory, or are the buildings the principal, and is the land the accessory? Take, on the one hand, the instance of a large warehouse or factory with a small yard attached for the more convenient access to it. Obviously the yard is accessory to the building. Take, on the other hand, the instance of land occupied as a farm, and having on it farm buildings and sheds used for the purpose of farming the land. Obviously there the buildings are accessory to the land. Here the land and buildings have been rated together as a whole; and I do not see how the quarter sessions could very well have done otherwise than they did. All the buildings seem to have been put there for the more convenient occupation of the land as a brickfield. If that be so, there is no doubt that the land is the principal and the buildings are accessory. But it may be that those who framed the rate were wrong in rating the subject as a whole, and that they ought to have divided up the holding into land and buildings. Except as to the house, we have not the materials upon which we could answer the question whether the rating authority was right in rating the subject as a whole. "Houses" are mentioned in the Lighting and Watching Act, and consequently, if taken separately, are to be rated at the higher rate. If the house in this case is to be lumped together with the large quantity of land, no doubt it may be said to be an accessory to the land; but I think that is the wrong way of dealing with it. If to rate it separately would not be taking more trouble than this cottage is worth, it ought to be rated separately, and at the higher rate specified

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in the Lighting and Watching Act. The questions, Can the brickfield be further divided up for rating purposes? and, Can the engine-house and the other buildings be rated separately from the brickfield? are questions which we cannot determine upon the materials before us. My own impression is that they cannot. They seem to derive their value entirely from the brickfield, and to have no other use to which they can be put. I say this, however, with some reserve, because the attention of the Court of Quarter Sessions was not called to this point. It might be shewn by the rating authority that there was some method of distinguishing these buildings or some of them, so that they could be rated apart from the brickfield.

In answer, therefore, to the first question asked in the case, I say that, under the circumstances, the quarter sessions were right in coming to the conclusion that the whole property occupied by the respondents, except the house, ought to be rated at the lower rate of 2*d.* in the pound; but as to the house, I think it should have been rated separately at the higher rate. As to the engine-houses, sheds, and other things specified in the case, the facts hardly enable me to give any satisfactory answer, because I do not know whether they could or could not be shewn to be capable of being separately used apart from the purposes they serve in connection with the brickfield. The inclination of my opinion is that they ought to be treated as accessory to the brickfield, and, therefore, as land rateable at the lower rate.

In answer to the second question, "Is the brickfield with the buildings and machinery thereon to be rated as property other than land at the higher rate of 6*d.* in the pound?" I say, certainly not, subject to what I have already said as to the house and as to the possibility of some of the other buildings and things being separated from the brickfield and made separate subjects of rating. As to the third question, I have already said that it may be worth while to rate the house separately; and, if so rated, it should be at the higher rate; and as to the other subjects of assessment mentioned in paragraph 11, I cannot answer the question. The answer must depend, as Blackburn J. pointed out in *Reg.* v. *Midland*

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Ry. Co. (1), upon whether they are accessory to the brickfield or not; and if any question is raised about that we may have to deal with it hereafter. I do not desire to express any doubt that the buildings are accessory to the brickfield not the brickfield to the buildings. The case must go back with this expression of our opinion.

LAWRANCE J. I am of the same opinion.

Case sent back accordingly. Leave to appeal.

Solicitors for appellants: *Pyke & Parrott, for J. C. Hayward, Dartford.*

Solicitor for respondents: *H. P. Davis.*

W. A.

THE QUEEN *v.* THE COURT OF THE COMPANY OF WATERMEN AND LIGHTERMEN OF THE RIVER THAMES.

1897
Jan. 26.

Certiorari—Court of Company of Thames Watermen—Judicial Order—Applications for Licences—Waterman's and Lighterman's Amendment Act, 1859 (22 & 23 *Vict. c. cxxxiii.*), *s.* 56 (*Local*).

Certiorari will not lie to remove an order, made by the court of the Company of Watermen and Lightermen of the River Thames under s. 56 of the Watermen's and Lightermen's Amendment Act, 1859 (Local), granting a licence to act as a waterman or lighterman within the limits of the Act.

RULE, obtained on behalf of H. Gosling, a waterman and lighterman of the River Thames and secretary of the Amalgamated Society of Thames Watermen and Lightermen, for a certiorari to remove and quash an order made by the court of the Company of Watermen and Lightermen of the River Thames, by which order a licence was granted to one Francis Lindsay authorizing him to act as a lighterman upon the Thames.

The company was incorporated under 7 & 8 Geo. 4, c. lxxv.

(1) L. R. 10 Q. B. 389, at p. 392.

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(Local), and its powers and duties are regulated by the Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 Vict. c. cxxxiii.) (Local), which repeals the earlier Act except as to the constitution of the company.

By s. 11 of the Act of 1859, the affairs of the said company shall continue to be managed by the court of master, wardens, and assistants. By s. 54, unlicensed persons, or persons not qualified as prescribed by the Act, are prohibited under a penalty from acting as watermen or lightermen within the limits of the Act for hire or gain. By s. 16, the proceedings of the court shall be entered in a book to be kept for that purpose, and signed by the master, warden, or member who presides. By s. 55, any person qualified as mentioned in the Act, and desirous of working as a lighterman or waterman within the limits of the Act, may apply to the court of master, wardens, and assistants for a lighterman's or waterman's licence, authorizing him so to work; and the court, if satisfied of the competency of such applicant, shall grant to him a lighterman's or waterman's licence accordingly. By s. 86, in every case in which any oath is by this Act directed to be made or taken, or any matter or thing is directed to be proved by oath, the court shall have full power to administer the oath. The Act, however, does not contain any direction that an oath shall be made or taken in applications for licences under s. 55, or that in the matter of such applications any matter or thing shall be proved by oath.

By other provisions of the Act the Court has power to hear and determine complaints for any offence or misbehaviour against the Act, and to convict offenders and impose fines upon them, and to compel the attendance of witnesses at the hearing of such complaints.

An application for a lighterman's licence was made to the court of the company by Francis Lindsay, and at the hearing of such application objection was made by the present applicant for a certiorari that Lindsay was not qualified as required by the Act to receive such licence. The court, having overruled the objection, made an order granting the licence. This rule for a certiorari was thereupon obtained, on the ground that the court of the company had no jurisdiction to make that order.

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T. Scrutton, for the court of the Company of Watermen and Lightermen of the River Thames, now shewed cause against the rule. Certiorari does not lie, because the order is not the order of a tribunal performing a judicial act. The powers and duties of the court of the company are mainly administrative. They are not acting judicially in hearing and determining applications for licences. They have no power to administer an oath on such applications. [He cited *Reg.* v. *Overseers of Salford* (1); *Reg.* v. *London County Council, Re Empire Theatre*. (2)]

Guy Granet, for the applicant, supported the rule. The court of the company is constituted by Act of Parliament, and invested with judicial powers. They have, for some purposes, power to administer an oath and to compel the attendance of witnesses. It is submitted that certiorari will lie to bring up their order, if made without jurisdiction, in this case.

WRIGHT J. I entertain no doubt that the order in question in this case was not a judicial order, and therefore that a writ of certiorari to remove it does not lie. I doubt very much whether, if certiorari did lie, the applicant would be entitled to be heard as a party actually aggrieved by the order.

BRUCE J. I agree.

Rule discharged.

Solicitors for the court of the company: *J. A. & H. E. Farnfield.*

Solicitors for applicant: *Safford & Kent.*

(1) (1852) 18 Q. B. 687. (2) (1895) 71 L. T. 638.

W. A.

C. A.
1897
April 6.

[IN THE COURT OF APPEAL.]

RENSHAW *v.* QUEEN ANNE RESIDENTIAL MANSIONS AND HOTEL COMPANY, LIMITED.

Practice—Arbitration—Agreement to Refer — Contract for Employment—Wrongful Dismissal—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

A contract for the employment of the plaintiff by the defendants for five years provided, among other things, that the defendants might dismiss the plaintiff, if he were guilty of gross misconduct, and that, if any dispute should arise between the defendants and the plaintiff touching their or his rights or liabilities under the contract, it should be referred to arbitration. The defendants dismissed the plaintiff on the ground of alleged misconduct, and the plaintiff thereupon brought an action against the defendants claiming damages for wrongful dismissal:—

Held, that the dispute was within the terms of the arbitration clause in the contract, and that reference of the plaintiff's claim to arbitration should be enforced under the Arbitration Act, 1889, s. 4.

Davis v. *Starr*, (1889) 41 Ch. D. 242, distinguished.

Appeal from an order of Day J. at chambers ordering a reference of the plaintiff's claim in the action as after mentioned.

By an indenture made June 1, 1896, between the defendants and the plaintiff, it was agreed that the plaintiff should during the term of five years from the date thereof, if he should so long live, serve the defendants as manager of the supply of electric light, water, power, and hot water required in the defendants' mansions, and the works incidental thereto, at a salary of 500*l.* per annum, payable quarterly on the usual quarter-days. The plaintiff was by the agreement, while he continued to be such manager, to have the general control and management of all matters and things relating to the said supply, and power to engage, direct, and dismiss any person employed or to be employed in or about the said supply, such employees to be paid by the defendants and at the expense of the defendants, such expense not to exceed 100*l.* in any one month, and to purchase any things, or order, make, or superintend and direct the executing or doing of any works, repairs, or things which

he might deem proper for furnishing the said supply, or for keeping the machinery or other things relating thereto in good repair and working order. It was further provided by the agreement that the defendants might at any time remove the plaintiff from the office of manager of the said supply, if he were guilty of gross misconduct, and that he might at any time resign the said office, if he were unable by reason of mental or bodily illness duly to perform the duties thereof, whereupon his salary was to cease; and that, if at any time any dispute, difference, or question should arise between the defendants and the plaintiff touching their or his rights or liabilities under the agreement or otherwise in relation to the premises, it should be referred to the President for the time being of the Institute of Civil Engineers, or to such other person as they should agree on as sole arbitrator, pursuant to the Arbitration Act, 1889, or any statutory modification or re-enactment thereof for the time being in force.

On December 30, 1896, the defendants dismissed the plaintiff from his employment as manager as before mentioned on the ground that he had been guilty of gross misconduct by allowing the engines supplying electric light to the defendants' mansions to run without governors, to the constant danger of the lives of the men employed in the engine-rooms.

The plaintiff thereupon brought an action claiming damages for breach of the contract to employ him for five years by wrongfully dismissing him before the expiration of that period. The defendants applied for an order to enforce a reference of the claim in the action under s. 4 of the Arbitration Act, 1889. The master refused the application; but on appeal to the judge he reversed the decision of the master and made an order for the reference of the plaintiff's claim to the arbitration of the President of the Institute of Civil Engineers.

Bigham, Q.C., and *Schiller*, for the plaintiff. The defendants, by dismissing the plaintiff without referring the question whether he was guilty of misconduct to arbitration, have repudiated the contract, and the plaintiff is thereby entitled to treat it as put an end to except for the purpose of bringing

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an action for damages for breach of it: see per Lord Esher M.R. in *Johnstone* v. *Milling*. (1) The defendants cannot therefore set up the agreement to refer contained in the contract. The case of *Davis* v. *Starr* (2) is precisely in point. The facts of that case are exactly similar to those of the present case. In that case the defendant had dismissed the plaintiff, and, an application being made for a stay of proceedings in the action, the Court refused to interfere, on the ground that, the defendant having taken upon himself to dismiss the plaintiff without waiting the decision of the matters in difference by arbitration, the Court ought not to exercise their power of staying proceedings in the action.

Dickens, Q.C., and *R. Younger*, for the defendants. In the case of *Davis* v. *Starr* (2) the Court in their discretion, under the circumstances of the case, refused to stay proceedings; but the case does not lay down any general principle with regard to applications under s. 4 of the Arbitration Act, 1889. It is contended that the dispute between the parties in the action is clearly within the arbitration clause of the agreement, as being a dispute touching their rights and liabilities under the agreement. That being so, the judge had jurisdiction to enforce the agreement to refer to arbitration under the Arbitration Act, 1889, s. 4.

Schiller, in reply.

LORD ESHER M.R. In this case the plaintiff had agreed to serve the defendants for a specified period of five years, and the defendants had agreed to employ the plaintiff for that period, unless the plaintiff should misconduct himself so grossly as to justify them in dismissing him previously to its expiration. It was further provided by the agreement between them that, if at any time any dispute, difference, or question should arise between the defendants and the plaintiff touching their or his rights or liabilities under the agreement, it should be referred to the President for the time being of the Institute of Civil Engineers. It appears to me clear that on the true construction of this provision a dispute as to whether the defendants were

(1) (1886) 16 Q. B. D. 460, at p. 467. (2) 41 Ch. D. 242.

entitled under the agreement to dismiss the plaintiff previously to the expiration of the five years comes within it. But it is argued that we are bound by the case of *Davis* v. *Starr* (1), and that the decision there shews that in such a case as the present the Court ought not to enforce the agreement to refer. If this case came within that decision, it would be necessary to consider how far we are bound by it. But does this case come within the decision in *Davis* v. *Starr* (1)? That depends upon the question what was really decided in that case. I must confess that I have some difficulty in following the grounds of that decision, but, as I understand the facts of that case, I do not think it was similar to the present case. It appears from the judgments of Lindley and Lopes L.JJ. that the defendant there was not ready and willing to submit the whole matter to arbitration, but was only ready and willing to refer the assessment of damages. In the present case the defendants were ready and willing to refer the whole matter. Therefore the case of *Davis* v. *Starr* (1) does not appear to me to govern the present case. I cannot see any ground for the contention that by the dismissal of the plaintiff the whole contract was put an end to so as to be no longer existing. The question was whether the dismissal of the plaintiff was a breach of the contract by the defendants, and, by virtue of the provision for reference of any dispute to arbitration contained in the contract, I think the judge had power to make the order which he made.

CHITTY L.J. I think this is a plain case. From the outset of the proceedings the defendants here were "ready and willing to do all things necessary to the proper conduct of the arbitration"; and, that being so, the Court would have, under s. 4 of the Arbitration Act, 1889, a discretionary power of staying proceedings in the action if the case is one to which the section applies. By the terms of the agreement the defendants had a right to dismiss the plaintiff from their employment if he were guilty of gross misconduct. In the absence of such misconduct they had no right to dismiss him. The agreement provides that, if any dispute arises between the

(1) 41 Ch. D. 242.

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Chitty L.J.

defendants and the plaintiff touching their or his rights or liabilities under the agreement, it shall be referred to the arbitration of the President of the Institute of Civil Engineers. Then, does a dispute whether there had been gross misconduct by the plaintiff, and whether the defendants therefore had a right to dismiss him, fall within that provision? It seems to me that this question admits only of an affirmative answer. It has been argued that, if we uphold the order of the learned judge, we shall be contravening the authority of *Davis* v. *Starr*. (1) It seems to me quite sufficient in dealing with that case to say that, according to the expressions used by the judges, more particularly by Lindley L.J. and Lopes L.J., the decision was put on the ground that the defendant who was asking for an order of reference was himself not ready and willing at the commencement of the proceedings to refer. As I read the case, the view on which the Court really acted was that the defendant was only ready and willing to refer some part of the dispute, and not the whole. I am of opinion that the order of the learned judge was correct, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Broughton, Nocton & Broughton.*
Solicitors for defendants: *Lee & Pembertons.*

(1) 41 Ch. D. 242.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1897
April 6.

In re Arbitration between FENNER and LORD.

Practice—Discovery—Inspection—Documents referred to in Affidavit—Order xxxi., *rr.* 15–18.

Notice of motion to set aside an award on the ground of misconduct of an arbitrator having been given, an affidavit was sworn by the arbitrator for the purpose of being used by the party in whose favour the award was made at the hearing of the motion. This affidavit referred to certain letters which had passed between that party's solicitor and the arbitrator. The affidavit was not filed, but a copy of it had been furnished to the opposite party:—

Held, that the letters were documents referred to in an affidavit within the meaning of Order xxxi., r. 15, and therefore a judge had jurisdiction to make an order for inspection of them under rule 18 of the order.

Appeal from the refusal of a judge at chambers to order inspection of documents as after mentioned.

There had been a submission of certain matters in difference by Lord, who was the appellant, and Fenner, the respondent, to the arbitration of two arbitrators, one of whom was appointed by each of them respectively, and their umpire. The arbitrators agreed in making an award in favour of the respondent. Notice had been given by the appellant to the respondent of a motion in the Queen's Bench Division to set aside the award on the ground of misconduct by the arbitrator appointed by the respondent. An affidavit had been sworn by the arbitrator for the purpose of being used on behalf of the respondent on the hearing of the motion to shew that there had been no misconduct by the arbitrator. A copy of this affidavit had been furnished by the respondent's solicitor to the appellant, but the affidavit was not filed. The affidavit referred to certain letters which had passed between the respondent's solicitor and the arbitrator. Notice was given to the respondent on behalf of the appellant to produce these letters for inspection, but inspection of them was refused. Thereupon application was made to a judge at chambers on

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behalf of the appellant for an order for inspection of them, but the judge refused the application. (1)

Boxall, for the appellant, Lord. By Order XXXI., r. 15, "every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice." Then under rule 17 the party to whom such notice is given is within a certain time to fix a time for inspection; and under rule 18, if he refuses to give inspection, a judge may make an order for it. The appellant was entitled to inspection of these letters as being documents referred to in an affidavit sworn in a "matter" within the meaning of Order XXXI., rr. 15 to 18.

Channell, Q.C., and *C. E. Jones*, for the respondent, Fenner. It is submitted that these letters were not documents referred to in an affidavit within the meaning of Order XXXI., r. 15. That rule applies to documents referred to in the "pleadings or affidavits" of a party to a cause or matter. The affidavits contemplated by the rule are affidavits which have been filed and have become part of the proceedings like pleadings. The affidavit in question here has not been and may never be filed, and therefore has not become part of the proceedings. It is optional whether it shall be used at the hearing of the motion. As a matter of courtesy it has been the practice for counsel to shew such affidavits to counsel on the other side before the hearing of the motion, but there is no law or practice compelling them to do so. If there is no right to see the affidavit itself, there can be no right to see letters referred to in it. Rule 17 of Order XXXI. does not refer to documents included in rule 15, but to documents in cases where there has been discovery on affidavit under rules 12 and 13. The only penalty for refusing inspection of documents under rule 15 is that they cannot afterwards be given in evidence. There was therefore no jurisdiction under rule 18 to order inspection of

(1) It has not been thought necessary to state the facts of the case further than was requisite in order to raise the point of law involved.

these letters. In any case the Court has a discretion under rule 18, and the application for inspection was quite unnecessary in this case, because, when the motion to set aside the award comes before the Divisional Court, that Court can, if they think it right that these documents should be produced, make an order to that effect.

Borrall, in reply. The appellant desires to have inspection of the documents before the hearing of the motion in order that he may be in a position to make out his case.

LORD ESHER M.R. In this case there had been an award made between the parties by two arbitrators, and a motion by one of the parties was pending to set it aside on the ground of misconduct by one of the arbitrators. The other party has caused an affidavit to be made by the inculpated arbitrator for the purpose of using it on the hearing of the motion to shew that there was no misconduct. It is said that there is no rule of law or of practice compelling him to shew that affidavit to his opponent before it comes to be actually used on the hearing of the motion. That may be true; but in this case it has been shewn to the opponent, and I should say rightly shewn to him, as a matter of conduct, and it contains a reference to certain letters which passed between the solicitor for the respondent and the arbitrator. The party on whose behalf the affidavit was made is no doubt not obliged to use it on the hearing of the motion, but he has procured it to be sworn in the matter and has shewn it to his opponent. The question is whether this is such a reference to documents in an affidavit as gives a judge authority to order inspection of these documents under the provisions of Order XXXI., rr. 15 to 18. It is clear that a motion to set aside an award is a "matter" within rule 15 of the order, and it seems to me that an affidavit made for the purpose of being used when the matter is heard comes within the terms of the rule; and therefore, if the preliminary condition mentioned in the rule is satisfied—that is to say, if the requisite notice to produce has been given—which is the case here, I think the rule applies. It was urged that rule 17 does not apply to the documents mentioned in rule 15, but only to

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cases where there has been an affidavit of documents under rules 12 and 13. I think that the rule may include other documents as well, but it clearly applies to the documents mentioned in rule 15. Then under rule 18, if inspection of the documents is refused under rule 17, the judge may make an order for such inspection. In this case the judge refused to make an order for inspection of these letters. I think under the circumstances of the case he ought to have made an order. Therefore this appeal must be allowed, and our order must be that the letters referred to in the affidavit in question must be produced for inspection.

CHITTY L.J. In this case an application was made to the judge at chambers for an order for inspection of certain letters under Order XXXI., rr. 15 to 18. In my opinion there was such a reference to these letters in an affidavit as was sufficient to bring the case within rule 15; and I agree with the Master of the Rolls in thinking that rules 17 and 18 apply to the documents mentioned in rule 15, and therefore the judge had jurisdiction to order inspection of these letters. There is a proviso to rule 18 by which a discretion is given to the judge, but I think that under the circumstances of this case he ought to have exercised his discretion in favour of the party making the application for inspection. For these reasons I think the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Nye & Moreton, for Nye & Treacher, Brighton.*

Solicitor for respondent: *A. S. C. Doyle, for Jones & Son, Colchester.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1897
March 25.

In the Matter of the Claim of DONISTHORPE and THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY.

Railway Regulation — Compensation — Land taken compulsorily or injuriously affected—Trial in Superior Court—Power of High Court to make Order—Jurisdiction of Master—Time from which Order of Judge on Appeal from Master takes effect—Order LIV., *r.* 12—*Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *s.* 41.

A question of compensation having arisen, under the Lands Clauses Consolidation Act, 1845, between a claimant and a railway company, the company, before issuing their warrant to the sheriff to summon a jury, applied under s. 41 of the Regulation of Railways Act, 1868, to a master for an order for the trial of the question in the High Court. The master refused the application, and the company appealed to a judge who made the order. In the meantime, and before the judge made the order, the company issued their warrant to the sheriff. On an appeal by the claimant against the order of the judge:—

Held, that the jurisdiction conferred by s. 41 of the Regulation of Railways Act, 1868, is now vested in the judges of the High Court and may, except as to the settling of an issue in case of difference, be exercised by a master under Order LIV., r. 12:

Held also, that the judge's order being that which the master should have made, the time when the master's order was made must be taken as the date of the judge's order, and as no warrant had then been issued the judge's order was in time.

APPEAL from an order of a judge at chambers.

The claimant Donisthorpe required the railway company to issue their warrant to the sheriff to summon a jury to assess the compensation payable in respect of lands injuriously affected by the works of the company.

The company applied to a master for an order under s. 41 of the Regulation of Railways Act, 1868 (1), for the trial of the

(1) 31 & 32 Vict. c. 119, s. 41: "Whenever, in the case of any lands purchased or taken otherwise than by agreement for the purposes of any public railway, any question of compensation in respect thereof, or any question of compensation in respect of lands injuriously affected by the execution of the works of any public railway, is under the provisions of the Lands Clauses Consolidation Act, 1845, to be settled by the verdict of a

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question in the High Court. The master refused the application, and the company appealed to a judge at chambers. As the time limited for issuing their warrant to the sheriff would run out before the appeal could be heard, the company issued i on the day that the master made the order. The appeal came on in due course before a judge at chambers, who made the order as prayed.

The claimant appealed.

Toller, for the claimant. The jurisdiction given to the masters under Order LIV., r. 12, is to "transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Acts or these rules may be transacted or exercised by a judge at chambers," and to this there is an exception in respect of "the settlement of issues, except by consent." There are therefore two objections to the exercise of jurisdiction by the master, the first that the authority is not given to a judge by "the Acts," that is, by the Judicature Acts, for a judge would act under the authority of the Regulation of Railways Act, 1868, s. 41; and the second, that the master cannot settle the issues requisite for the trial of the question. By s. 42 of the Act of 1868 the obtaining of a judge's order under s. 41 is to be a satisfaction of the com-

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jury empannelled and summoned as in that Act mentioned, the company or the party entitled to the compensation may, at any time before the issuing by the company to the sheriff as by that Act directed, apply to a judge of any one of the Superior Courts of Common Law at Westminster, who shall, if he think fit, make an order for trial of the question in one of the Superior Courts upon such terms and in such manner as to him shall seem fit; and the question between the parties shall be stated in an issue to be settled in case of difference by the judge, or as he shall direct, and such issue may be entered for trial and tried accordingly in the same manner as any issue joined in an ordinary action at such place as the judge shall direct; and the proceedings in respect of such issue shall be under and subject to the control and jurisdiction of the Court as in ordinary actions therein, but so nevertheless that the jury shall, where the issue relates to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to lands held therewith, deliver their verdict separately in manner provided by the forty-ninth section of the Lands Clauses Consolidation Act, 1845."

pany's duty in respect of the issue of the warrant; but here the order of the judge was made after the issue of the warrant, and was therefore out of time under s. 41. When once the warrant has been issued there is no power to set it aside, and the order of the judge was made without jurisdiction. If the judge had any authority it was under s. 12 of the Judicature Act, 1873, and could not be exercised by a master.

J. Eldon Bankes, for the company. Sect. 16 of the Judicature Act, 1873, transfers to the judges of the High Court "all powers given to any judges or judge by any statute." The jurisdiction is therefore under the Judicature Acts, and may be exercised under Order LIV., r. 12, by a master. Sect. 12 of the Judicature Act, 1873, does not apply, for it relates only to authority "not incident to the administration of justice in any court."

Toller, in reply.

LORD ESHER M.R. In this case an order has been made by a judge at chambers under s. 41 of 31 & 32 Vict. c. 119, that a compensation case shall be tried before a judge and a jury. If the summons had been primarily taken out before the judge, and had been in time, it seems that according to the section he would have had jurisdiction to make the order; but it is objected that he had no jurisdiction because, before the order was made, a warrant had been issued to the sheriff, so that there was no power under s. 41 to make the order. But it appears that in the first place a summons was taken out before a master, who refused the order, and that at that time the warrant to the sheriff had not been issued. If, therefore, the master could make such an order, and had made it, the issue of the warrant to the sheriff would manifestly have been wrong and the warrant itself void.

It is objected that the master had no jurisdiction to make an order, and that therefore the order of the judge was not one superseding that of a master, but was an original order, and was made too late, as the warrant to the sheriff had issued. On the other side it is said that the master had jurisdiction, and that the judge's order was on appeal from the master, and

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replaced the master's order. It is further said that when this happens the case is to be treated as if the master had made the order which he ought to have made, so that the order must be taken to have been made when the master should have made it—that is, before the warrant was issued to the sheriff.

The first point is to see whether the application could be made to a master. By s. 41 of the Regulation of Railways Act, 1868, the application is to be made to a judge, who alone had jurisdiction to make an order; and in my opinion, up to the passing of the Judicature Acts and the making of rules and orders under the authority of these Acts, that was so. The judge who, at that time, had authority to make such an order was a judge of one of the Superior Courts of Common Law. Sect. 12 of the Judicature Act, 1873, does not apply; it is s. 16 that governs this case. By that section "the jurisdiction by this Act transferred to the High Court of Justice shall include," among other things, "the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the judges of the said Courts respectively, sitting in court or chambers, or elsewhere, when acting as judges or a judge in pursuance of any statute, law, or custom, and all powers given to any such court, or to any such judges or judge, by any statute." These words seem to me clearly to say that the jurisdiction under s. 41 of the Regulation of Railways Act, 1868, is transferred to a judge of the High Court. That being so, Order LIV., r. 12, provides that in the Queen's Bench Division a master may, except in certain cases of which this is not one, "transact all such business and exercise all such authority and jurisdiction in respect of the same as, under the Acts or these rules, may be transacted or exercised by a judge at chambers." It is said that "the Acts" by the interpretation clause mean the Judicature Acts; but this jurisdiction is one given to the High Court by the Judicature Act, 1873, and is therefore within the rule. The master had, therefore, jurisdiction. He refused to make the order, and the judge at chambers, I will not say overruled the master, but, when the summons was carried from the master to him, differed from the master, and thought that he

ought to have made the order. That being so, as we said on a case that came before us lately, the master ought to have made the order that the judge made, and the time when the master decided the case is to be taken as the time of the judgment. If that time is taken the order was made before any warrant was issued, and was within the time limited by the section, and the appeal fails on the question of time. The judge's order was right, and, as it was in time, it follows that the warrant to the sheriff was wrongly issued, and is to be treated as of no effect.

The appeal will be dismissed.

LOPES L.J. This is an application under s. 41 of the Regulation of Railways Act, 1868, with regard to an order made by a learned judge under that section, which it is said was made after the warrant to the sheriff had been issued, and therefore too late.

The application to the master was in time, and if the master had jurisdiction to make an order I am of opinion that the judge had jurisdiction to make the order when the matter came before him, because on appeal he was making the order which the master could have made. The material question in this case is whether the master had jurisdiction to make the order. Before the Judicature Act, 1873, he could not have done so, and we must look at that Act to see how the jurisdiction of the old Superior Courts is dealt with, and what jurisdiction is transferred to the High Court. That depends on s. 16 of the Act, and the effect of that section is, in my judgment, to transfer the statutable power given by s. 41 of the Regulation of Railways Act, 1868, to the High Court to be exercised by the judges of that Court, or any judge of that Court sitting in chambers. If the case stopped there that would be sufficient so far as the jurisdiction of the judge is concerned; but in dealing with the question of the jurisdiction of the master, we must look to Order LIV., r. 12. Having regard to this rule, the matter stands thus: s. 16 shews that this jurisdiction may be exercised by a judge of the High Court, and Order LIV., r. 12, says that the master shall have the same power as a judge in respect of

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Lopes L.J.

certain matters, including this case, but subject to certain exceptions with which I will deal.

It is said that there is an exception in this rule of the settlement of issues except by consent, and it was contended that, inasmuch as it might be necessary to settle an issue, the exception applies. I do not think that point is a good one. No application was made to settle an issue, and the question did not arise. If there had been an issue to be settled and a difference had arisen, I take it that matter would have to be dealt with by a judge; but unless a question of that kind arose the master would have complete jurisdiction to make the order that was asked for in this case.

The result is that the appeal must be dismissed, and the effect of our decision is that this order satisfies the company's duty, and the warrant is of no effect.

CHITTY L.J. The substantial question here is, Had the master jurisdiction to entertain the summons? In my opinion he had.

The jurisdiction was conferred upon a judge of the Superior Courts by s. 41 of the Act of 1868. The Judicature Act of 1873, by s. 16, transferred to the High Court, not merely the jurisdiction of the Superior Courts at Westminster, subject to certain exceptions which are quite immaterial, but also the jurisdiction which was vested in or capable of being exercised by any judge sitting in chambers when acting as a judge in pursuance of any statute. I think this case falls within that section. Consequently there was a transfer of the jurisdiction which existed in the judges of the Superior Courts to the High Court. Then turning to Order LIV., r. 12, I find that masters of the Queen's Bench Division may exercise all such authority and jurisdiction as under the Judicature Acts (that is the meaning of the phrase "the Acts") "may be transacted or exercised by a judge at chambers," except with regard to certain matters. The result therefore is that, in my opinion, the master had jurisdiction to entertain the summons.

It was argued that s. 12 of the Judicature Act, 1873, applies. By that section provision is made for the extraordinary duties

of the judges, and the limiting words at the commencement of the section are, "Not incident to the administration of justice in any Court." The result is that s. 12 has no application to the present case, and s. 16 stands unaffected by that section.

The only other point to be mentioned is, that the master has no jurisdiction to settle issues except by consent; and, referring to s. 41 of the Act of 1868, it was said that the jurisdiction to be exercised under that section was a jurisdiction not merely to order the trial in the manner pointed out, but also to settle the issues. Now, had it been necessary that there should be one order at the same time directing the trial before a judge and settling the issue, the case would have stood differently; but it is plain, from the language of s. 41 itself, that the issue may be settled by a subsequent order. The result therefore is, that the master's jurisdiction to make the order remains unaffected; and, of course, if there should be in this case, as is possible but not very likely, any question with regard to the settlement of issues, that question must go before the judge in chambers, unless the parties should happen to agree.

For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for claimant: *Surr, Gribble & Co., for Toller & Son, Leicester.*

Solicitors for company: *Cunliffes & Davenport, for John Storey, Leicester.*

A. M.

C. A.
1897
April 5.

[IN THE COURT OF APPEAL.]

SMITH *v.* CHORLEY RURAL COUNCIL.

Local Government—Refusal to approve Building Plans—Action of Mandamus —Prerogative Writ.

Where a local authority have, in good faith, refused to pass building plans, on the ground that the erection of the proposed houses would amount to the laying out a new street of a width which is insufficient under their by-laws, no action will lie for a mandamus to compel them to approve the plans.

Judgment of Kennedy J., ante, p. 532, affirmed.

APPEAL from a judgment of Kennedy J. on further consideration, reported ante, p. 532.

The plaintiff was the owner of certain land at Chorley, in the county of Lancaster, in respect of which the defendants were the sanitary authority. The plaintiff proposed to build houses upon this land, and, in accordance with the by-laws of the defendants, he deposited plans of the houses he proposed to erect. The defendants, being of opinion that the building of the proposed houses would amount to a laying out or constructing a new street, declined to sanction the plans, on the ground that the width of the street would be insufficient under the by-laws.

The plaintiff brought an action for a mandamus to compel the defendants to pass the plans.

The action was tried with a jury, who found that the proposed building did not amount to laying out a new street.

On further consideration the learned judge gave judgment for the defendants. (1)

The plaintiff appealed.

E. Sutton (*Sington* with him), for the plaintiff. Application could be made for a prerogative writ, but an action for a mandamus is an alternative remedy. The claim here is in a matter of a quasi public character in which the plaintiff is

(1) Ante, p. 532.

personally interested, and an action claiming a mandamus is the proper and convenient remedy: *Fotherby* v. *Metropolitan Ry. Co.* (1) It is true that ordinarily mandamus will not lie if the persons to whom it would be directed have considered and determined the matter; but in this case the defendants have found as a fact something which does not exist, and they cannot escape from their duty by doing this, but can be controlled by the Court: *Reg.* v. *Tynemouth Rural District Council.* (2) [He cited *Reg.* v. *Lambourn Valley Ry. Co.* (3); *Reg.* v. *London and North Western Ry. Co.* (4)]

C. A. Russell, Q.C. (*F. H. Mellor* with him), for the defendants. The defendants having exercised their discretion, there is no power to interfere with their decision either by prerogative writ or by action of mandamus. There is no case in which on an application for a mandamus the Court has entered upon the question whether the decision of a public body was erroneous or not. This is not the case of a public body taking into consideration something which they had no right to consider. If the prerogative writ will lie that is the proper remedy, and not an action of mandamus. That action can no longer be brought under the Common Law Procedure Act, 1854, s. 68, for that section is repealed; and under Order LIII., which is substituted for it, the claim for a mandamus can only be made as ancillary to some other cause of action.

[He was stopped.]

[He cited *Reg.* v. *St. Pancras Vestry* (5) and *Reg.* v. *Newcastle-upon-Tyne Corporation.* (6)]

E. Sutton, in reply, referred to *Reg.* v. *Fulwood Local Board.* (7)

LORD ESHER M.R. In this case the defendants were a local authority who had power to approve or disapprove plans relating to houses proposed to be erected in their district. The plaintiff submitted plans of proposed houses to the defendants,

(1) (1866) L. R. 2 C. P. 188.
(2) [1896] 2 Q. B. 451.
(3) (1888) 22 Q. B. D. 463.
(4) [1894] 2 Q. B. 512.
(5) (1890) 24 Q. B. D. 371.
(6) (1889) 60 L. T. 963.
(7) (1895) 72 L. T. 592.

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SMITH v. CHORLEY RURAL COUNCIL.

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whose duty was not merely ministerially to put "approved" or "disapproved" on the plans, but to determine whether they would or would not approve them. It is admitted that they honestly entertained and considered the question before them, which depended, among other things, on whether the street in which the houses were to be built was a new street or not. That matter was the very foundation of their decision, and they decided that it was a new street and disapproved the plans. It is impossible to say that at that moment they had done anything beyond their jurisdiction, and it is clear they acted within it. It is not suggested that any appeal will lie from their decision to any court. What the plaintiff, against whom the decision was given, has done is to bring an action for a mandamus to compel the defendants to alter their decision and approve the plans. The learned judge was asked to say that there was no question to go to the jury, but he left to the jury the question whether it was a new street; and the jury differed from the local tribunal and said it was not. On further consideration the argument was to the same effect, that there was no question to go to the jury, and the learned judge came to that conclusion because the action was in effect by way of appeal from the decision of the local tribunal acting honestly in the exercise of their jurisdiction. If he had heard the argument when the case was tried, he would then have come to the conclusion that the action did not lie and that there was no question for the jury under the circumstances. All we have to do to-day is to decide whether he was right in his view; and I am of opinion that he was, and the appeal must be dismissed.

LOPES L.J. Many points have been argued in this case; but the one we have to deal with is this. Plans were laid before the district council, who did not refuse or neglect to consider them, but, exercising their discretion, they disapproved of them, thinking that the street in which the houses were to be built was a new street. The rule applicable to such a case is that the exercise of the discretion of a tribunal, however erroneous it may be, upon a question within its jurisdiction and when honestly exercised, cannot be questioned. Any other

conclusion would lead to this—that though the Legislature has entrusted to a local tribunal a discretion as to a particular matter which they consider, and as to which they honestly exercise their discretion, still the Court could direct them to exercise their discretion in a different way—a result which in my opinion would be absurd. I think the learned judge was right in his judgment on further consideration, and that the appeal fails.

CHITTY L.J. This action is brought to obtain a mandamus ordering the defendants, the district council, to give their approval to plans they had previously disapproved. They had jurisdiction in the matter, which they honestly exercised, and it was part of the question before them whether the building of the new houses amounted to laying out a new street. It is apparent that the object of the action is that the High Court may review the decision arrived at by the district council and overrule it. In my opinion such an action will not lie. The appeal therefore fails, and must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Rowcliffes & Co., for Richard Jackson & Son, Chorley.*

Solicitors for defendants: *Crowders & Vizard, for Stanton & Sons, Chorley.*

A. M

C. A.

1897

April 9.

[IN THE COURT OF APPEAL.]

THE GUARDIANS OF THE POOR OF THE ST. OLAVE'S UNION, APPELLANTS *v.* THE GUARDIANS OF THE POOR OF THE CANTERBURY UNION, RESPONDENTS.

Poor Law—Settlement—Irremovability—Computation of Time of Residence—Exclusions—Patient in Hospital—Poor Removal Act, 1846 (9 & 10 *Vict. c.* 66), *s.* 1—*Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

The residence for a term of three years which confers a settlement under the Divided Parishes Act, 1876, is residence for three consecutive years, under the conditions provided by the Act.

Dorchester Union v. *Weymouth Union*, (1885) 16 Q. B. D. 31, approved.

The period during which a person is a patient in a hospital must be excluded in computing the time necessary for his acquisition of a settlement under the Divided Parishes Act, 1876.

Judgment of the Divisional Court, ante, p. 438, affirmed.

APPEAL from the judgment of a Divisional Court, reported ante, p. 438.

Case stated by the recorder of Canterbury, on an appeal from an order of justices for the removal of Edward James Farr, a pauper, from the respondent union to the appellant union, on the ground that he was legally settled in that union.

The pauper was the lawful son of Arthur and Ellen Farr, and was born on April 1, 1887, in the Greenwich Union. Ellen Farr died in 1888, and in 1889 the pauper was sent by his father to reside with a relative in the respondent union, where he remained until he became chargeable.

Arthur Farr, the father of the pauper, went to reside in the appellant union in July, 1892, and continued for a period of more than three years to have his residence and his house in that union until his death on April 15, 1896. On May 1, 1895, he was admitted into the Brompton Hospital for Consumption, outside the appellant union, and remained there till the end of June in the same year, when he went to a convalescent home at Sandgate (also outside the appellant union). He remained there till July 29, 1895, when he returned to his house in the

appellant union, and remained there until his death. The pauper was sent to the respondents' workhouse in March, 1896, and an order was made by justices on April 24, 1896, for his removal to the appellant union. On appeal to quarter sessions the recorder held that Arthur Farr had acquired a settlement in the appellant union notwithstanding his absence from that union during the months of May, June, and July, 1895, and that the pauper had not become irremovable from the respondent union, and he accordingly confirmed the order of the justices.

The Divisional Court (Wright and Bruce JJ.) reversed the decision of the recorder (1) on the ground that the period during which Arthur Farr was in hospital must be excluded under the provisions of the Poor Removal Act, 1846, s. 1, so that he had not acquired a settlement in the appellant union within the meaning of the decision in *Dorchester Union* v. *Weymouth Union*. (2)

The respondent union appealed.

Dickens, Q.C., and *Hohler* (*Joseph* with them), for the respondent union. Mere voluntary residence in a hospital does not constitute a break of residence. The Poor Removal Act, 1846, s. 1 (3), draws a contrast between residing and being confined, and the latter word is applied to patients in a hospital. There is no necessity for reading the section otherwise than according to its grammatical expression, for the provision as to confinement in a hospital is satisfied by the case of compulsorily detaining certain women in lying-in hospitals under 13 Geo. 3, c. 82, ss. 14, 15.

(1) Ante, p. 438.

(2) 16 Q. B. D. 31.

(3) 9 & 10 Vict. c. 66, s. 1: "No person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years (reduced to one year by 28 & 29 Vict. c. 79) next before the application for the warrant: Provided always, that the time during which such person shall be a prisoner in a prison, or shall be serving Her Majesty as a soldier, marine, or sailor, or reside as an in-pensioner in Greenwich or Chelsea hospitals, or shall be confined in a lunatic asylum, or house duly licensed or hospital registered for the reception of lunatics, or as a patient in a hospital, or during which any such person shall receive relief from any parish . . . . shall for all purposes be excluded in the computation of the time hereinbefore mentioned."

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1897

ST. OLAVE'S UNION v. CANTERBURY UNION.

The effect of the section is that the periods named are to be excluded for all purposes, that is, whether the time of residence is being considered or whether a break in residence is set up: *Hartfield* v. *Rotherfield*. (1) Here the time of residence is primâ facie sufficient, and the appellant union are trying to set up a break during the absence in hospital, and that by the express words of the section they are not entitled to do.

The Divided Parishes Act, 1876, s. 34 (2), does not mention calendar years. The whole time of Arthur Farr's residence, exclusive of the time during which he was in the hospital, is more than three years, and there are three periods of a year, each of which was sufficient to confer a status of irremovability. It is not necessary that these periods should be consecutive. In point of fact Arthur Farr had a residence in the appellant union during the whole time, including that in which he was living in the hospital. He always had the intention to return to his house, and, under these circumstances, there was no break in his residence; but even if there was a break, it did not prevent his acquiring a settlement. *Dorchester Union* v. *Weymouth Union* (3) was wrongly decided, and should be overruled.

Macmorran, Q.C. (*Harper* with him), for the appellant union. This is a case of settlement, not of irremovability. The Divided Parishes Act speaks of a "term" of three years. This can only mean three consecutive years, and if the residence is broken in one of those years the conditions imposed by the Act are not complied with. The proviso to the Poor Removal Act, 1846, must be read as referring to "residence" in a hospital, and it places such residence on the same footing as the receipt of relief.

[He was stopped.]

LORD ESHER M.R. On the true construction of s. 34 of the Divided Parishes Act, 1876, it seems to me beyond all question that the term of three years mentioned must mean three con-

(1) (1852) 17 Q. B. 746; 21 L. J. (M.C.) 65.

(2) 39 & 40 Vict. c. 61, s. 34: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein."

(3) 16 Q. B. D. 31.

secutive years. Settlement is to be acquired by a residence in each of such years which would render the person residing irremovable, and if there is no such residence in any one of the years the condition is not fulfilled. We must look back to the Poor Removal Act, 1846, to see what the manner and circumstances of residence are which would render the person irremovable. There we find, reading in the effect of later statutes, that residence for one year next before the application for a warrant is to make a person irremovable. Then there is a proviso that in the application of the rule of the enacting part of the section the time during which such person shall have been a patient in a hospital is not to be counted. It is said that the expression is "confined as a patient in a hospital," that this means compulsorily confined, and that there are cases of compulsory confinement to which this can apply. It seems to me obvious that the words cannot have been intended to apply to the suggested case of a woman in a lying-in hospital. The governing word applicable to the case of a patient in a hospital is "reside," and not "confined," and the statute should be so read.

We are told that Lord Campbell in *Hartfield* v. *Rotherfield* (1) decided that by reason of the proviso the enacting part of the section was of no effect. I do not think he did so decide; but if he did, the reasoning in *Dorchester Union* v. *Weymouth Union* (2) is more satisfactory to my mind. I find it impossible to differ from the conclusion in that case, and it is admitted that if that decision is to stand the judgment of the Divisional Court must be affirmed. As to the question of the animus revertendi of Arthur Farr while in the hospital, I think, for the reasons I have given, that question is excluded in the construction of the section.

The appeal must be dismissed.

LOPES L.J. The question that arises is what is the meaning of the expression "term of three years" in the Divided Parishes Act, 1876—whether this refers to three consecutive years or not.

(1) 17 Q. B. 745; 21 L. J. (M.C.) 65.
(2) 16 Q. B. D. 31.

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Lopes L.J.

In *Dorchester Union* v. *Weymouth Union* (1) this was decided in the affirmative; but it is contended that that case was wrongly decided and ought to be overruled. It is important to notice that the matter at a later period came before the House of Lords in *Reigate Union* v. *Croydon Union* (2), and that Lord Watson referring to s. 34 treats it as dealing with residence for three consecutive years. (3) The residence must be such as would, "in accordance with the several statutes in that behalf," render the person irremovable, and we must refer to the Poor Removal Act, 1846, to ascertain what those conditions are. The proviso to s. 1 of this Act deals with certain breaks in residence which are for all purposes to be excluded in the computation of the time of residence. As to one of these breaks, the time during which a person is a patient in a hospital, it is contended that in order to exclude such a period it must have been a compulsory detention, because the sentence must be read "confined as a patient in a hospital," and that is only applicable to a compulsory detention. As I read the section, the previous word "reside" is applicable to the case of a patient in a hospital, and I think it would be inconsistent with the intention of the section if we held that there was no disruption arising from residence in a hospital. If residence in a hospital is not excluded it would come to this—that a person might reside for three years in a hospital at the public expense and acquire a settlement thereby. If the time spent in a hospital is to be excluded, it follows that in this case Arthur Farr did not acquire a settlement in the appellant union, and that there is no derivative settlement in his son in that union.

It was urged that while in the hospital there had always been on the part of Arthur Farr an animus revertendi. The argument that, therefore, there was no break in residence is untenable, because one of the periods excluded by the Poor Removal Act, 1846, is that in which relief is given, and such relief may be given to a man in his own house—a state of things to which any question of animus revertendi is inapplicable.

(1) 16 Q. B. D. 31. (2) (1889) 14 App. Cas. 465.
(3) 14 App. Cas. at p. 481.

Under these circumstances the judgment of the Divisional Court should be affirmed.

CHITTY L.J. I think the case of *Dorchester Union* v. *Weymouth Union* (1) was correctly decided. The expression "term" imports continuity, and the words which follow, "in each of such years," confirm this view. Lord Watson, in the opinion to which reference has been made, treated it as a matter beyond doubt that the three years must be consecutive, and I think there cannot really be any room for doubt in the matter. With regard to the word "confined" in the Poor Removal Act, 1846, if the strict grammatical construction necessitated its being read with the words "as a patient in a hospital," I do not think it would necessarily imply a compulsory confinement. Such a case of compulsory confinement was discovered, namely, that in which a woman could be detained at a lying-in hospital to which she had gone; but, to my mind, it would be strange if the Legislature was directing its attention to such an exceptional case. The word "reside" occurs previously in the section, and I think it is sufficiently expressed that that word is applicable to the case of a patient in a hospital. I agree with the remarks that have been made on the argument raised on the suggestion that during the stay in the hospital there was an animus revertendi.

Appeal dismissed.

Solicitors for appellants: *Arkcoll, Cockell & Chadwick.*

Solicitors for respondents: *Speechly, Mumford & Co., for John Plummer, Canterbury.*

(1) 16 Q. B. D. 31.

A. M.

C. A.
1897
April 8.

[IN THE COURT OF APPEAL.]

PEARCE *v.* GARDNER.

Contract—Memorandum in Writing—Names of Parties—Letter in Envelope—Letter and Envelope taken as one Document—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4—*Sale of Goods Act*, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 4.

An envelope and a letter which is shewn by evidence to have been inclosed in it are so connected together that the envelope may be used to supply the name of one of the parties to a memorandum in writing of a contract within s. 4 of the Statute of Frauds, or s. 4 of the Sale of Goods Act, 1893.

APPEAL from the judgment of Grantham J. at the trial of the action with a jury.

The action was brought for breach of a contract to sell to the plaintiff some gravel, to be dug and carried away by the plaintiff. The defence was that a written contract was necessary, and that there was no written contract which contained all the terms of the bargain and the names of both the contracting parties. The writing relied on was a letter signed by the defendant and addressed "Dear Sir," but not containing on the face of it the name of the plaintiff, or any words identifying him. At the trial the plaintiff gave evidence that he had received the letter through the post in an envelope addressed to him. The envelope was not produced, but no objection was taken to the plaintiff's evidence on the ground that he had not proved the loss of the envelope and was not in a position to give secondary evidence of what was on it. The jury found a verdict for the plaintiff, and judgment was given accordingly.

The defendant appealed.

Blake Odgers, *Q.C.*, and *H. A. Forman*, for the defendant, argued that whether as a sale of an interest in land or of goods above the value of 10*l.* a writing containing the names of the parties and all the terms of the contract was necessary; that as to the terms of the contract the finding of the jury was against the weight of the evidence; and that as to the names

of the parties the envelope could not be connected with the letter so as to supply the name of the plaintiff.

[They cited *Champion* v. *Plummer* (1); *Williams* v. *Byrnes* (2); *Vandenbergh* v. *Spooner* (3); *Williams* v. *Jordan*. (4)]

Compton Smith (with him *Atherley Jones*, *Q.C.*), for the plaintiff, contended that the finding of the jury was correct, and that the identity of the "Dear Sir" in the letter was disclosed by the name of the plaintiff on the envelope. [He cited *Potter* v. *Duffield* (5) and *Catling* v. *King*. (6)]

Blake Odgers, *Q.C.*, in reply.

LORD ESHER M.R. This is an action against the defendant as the alleged vendor of a quantity of gravel to recover damages from him for not carrying out the contract. It was urged that this was an agreement for an interest in land and within s. 4 of the Statute of Frauds, or that if it was not it was a sale of goods for future delivery within s. 4 of the Sale of Goods Act, 1893, which is the equivalent of s. 17 of the Statute of Frauds. In the view of the case which we take, it is immaterial to consider within which section the facts bring the case, for in either case a memorandum in writing to satisfy the statute would be required, and the real question is whether there is such a memorandum. We have a writing which the jury by their verdict have said contains all the terms of the contract. It is in the form of a letter from the defendant signed by him, but commencing with the words "Dear Sir," and containing no name to indicate to whom it was written. At the trial the plaintiff gave evidence to which no objection was raised that he received the letter in an envelope on which was his name. Had there been any objection raised the plaintiff must have shewn that the envelope had been destroyed or could not be found on a search, but he was not asked as to this, and we must take it as a fact that a letter containing all the terms of the contract, and signed by the defendant, reached the plaintiff in an envelope directed to him. The great struggle was as to whether in that state of things the letter and the envelope

(1) (1805) 1 B. & P. (N. R.) 252.
(2) (1863) 1 Moo. P. C. (N.S.) 154.
(3) (1866) L. R. 1 Ex. 316.
(4) (1877) 6 Ch. D. 517.
(5) (1874) L. R. 18 Eq. 4.
(6) (1877) 5 Ch. D. 660.

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can be taken together to constitute the memorandum required. No case has been cited deciding this point either way, so that we have now to determine the matter. I adopt the suggestion made in Dart on Vendors and Purchasers, at p. 253 of the 6th edition, which is as follows: "In the case of a letter, if the name of the party to whom it is addressed appear in an indorsed direction, or be written at the foot of the letter, no difficulty on the above point can arise: if an envelope be used the name may often not appear in the letter; but the Court, it is conceived, would receive evidence connecting the envelope with the inclosure." The common sense of the matter seems to me to be that the envelope and the letter within it were sent together and may be taken together; so that the effect is the same as if the name of the plaintiff had been written at the foot or indorsed on the letter. I come, therefore, to a conclusion that there was a sufficient memorandum in writing, and that the judgment of the learned judge was right.

The appeal must be dismissed.

LOPES L.J. This action is brought to recover damages for breach of a contract which requires a memorandum in writing either under s. 4 of the Statute of Frauds, or under s. 4 of the Sale of Goods Act, 1893, which has been substituted for s. 17 of the Statute of Frauds. Such a memorandum must shew what is the contract and who are the contracting parties, though it need only be signed by the party to be charged.

In the present case everything required appears in a letter signed by the defendant with the exception of the name of the plaintiff as the other contracting party. That defect it is attempted to remove by means of the address on an envelope. The evidence on this point is that the letter reached the plaintiff by post in an envelope fastened and directed to him. In my opinion that state of facts is sufficient to meet the objection. The envelope was a necessary concomitant of the letter, which without it would not have reached its destination, and I think they must be taken together as one document. If the name of the plaintiff had appeared on the letter, that would have been sufficient, and in my opinion the effect is the same where the

name appears on the envelope in which the letter is sent. The evidence as to the envelope was given without objection, and the facts must be taken as I have stated them. Under these circumstances, I think the judgment appealed from was right.

CHITTY L.J. Whether this sale is brought within s. 4 of the Statute of Frauds, or s. 4 of the Sale of Goods Act, 1893, it is not necessary to decide, for in either case the point raised is the same. As to whether the letter written by the defendant contained all the terms of the contract, the question is determined by the verdict of the jury, with which I see no reason to interfere. The other point is whether the envelope inclosing the text of the letter can be referred to in order to shew that the requirements of the statutes have been complied with. It is a matter of common knowledge that formerly letters were written on one sheet of paper, which was folded up and indorsed with the name and address of the person to whom it was to be sent. Subsequently, about 1840, adhesive envelopes were introduced, and since then the old method has to some extent come into use again as a combination of letter and adhesive envelope. In my opinion, it would be contrary to good sense to hold that there is any distinction between the effect produced by these three methods of sending a letter.

The letter and its contents reached the plaintiff, and it seems to me that there is no difficulty in dealing with the whole as one document. It is suggested that this would be to introduce the mischief against which the statute was intended to provide; but the answer to this objection is that it has long been established that parol evidence is admissible to connect separate documents. In *Long* v. *Millar* (1) Bramwell L.J. treats it as settled that an agreement referred to in a document may be identified by parol evidence.

I agree that the decision appealed from is right, and should be affirmed.

Appeal dismissed.

Solicitors for plaintiff: *Hicklin, Washington & Passmore.*
Solicitors for defendant: *Grundy, Izod & Grundy.*

(1) (1879) 4 C. P. D. 450.

A. M.

C. A.
1897
Feb. 12;
April 12.

[IN THE COURT OF APPEAL.]

THE SOUTH AFRICAN TERRITORIES, LIMITED *v.* WALLINGTON.

Company—Debentures—Agreement to accept Debenture—Failure to pay Instalment—Action for Breach of Contract—Measure of Damages.

The damages for breach of a contract to take debentures in a company are measured by the loss sustained through the breach, and not by the sum agreed to be lent.

Appeal from the judgment of Wright J. at the trial without a jury.

The following statement of the facts of the case is taken from the written judgment of Chitty L.J. The plaintiff company, being desirous of obtaining a loan of 75,000*l.*, issued a prospectus inviting subscriptions. The prospectus stated the terms of the proposed loan and the security offered. The loan was to be in sums of 50*l.*, secured by first mortgage debentures for that amount, the debentures constituting a floating charge on the whole of the properties and assets of the company. The loan was also to be secured by a trust deed. The money was to be paid by instalments—namely, 10 per cent. on application, 15 per cent. on allotment, and the balance by equal instalments payable two, four, and six months after allotment. The interest on the loan was to be at the rate of 6 per cent., payable quarterly, and the principal was to be repaid on December 31, 1900, with a bonus of 7*l.* 10*s.* for every 50*l.* debenture. The allottees were to have a right or option to exchange their debentures for shares within two years after December 31, 1896. The prospectus stated that the whole proceeds of the issue would be used for working capital and the general expenses of the company, including the cost of the issue, and that failure to pay any instalment when due would render previous payments liable to forfeiture. A form of application for the debentures accompanied the prospectus. The defendant signed one of these forms for sixteen debentures, and paid the deposit of 80*l.*,

being 5*l.* on each debenture. On this application the plaintiffs allotted sixteen debentures to the defendant, and gave him notice of the allotment.

Under this contract the defendant was not entitled to have the debentures delivered to him until he had paid the final instalment. The defendant having made default in payment of three of the subsequent instalments, this action was brought. The plaintiffs claimed, firstly, specific performance of the contract; secondly, the balance of the price (as they called it) of the debentures; and, thirdly, damages.

The learned judge gave judgment for the plaintiffs for 520*l.*, being the amount payable on allotment and on the first two instalments, the time for payment of which had expired at the time the action was brought.

The defendant appealed.

Feb. 12. *Gore Brown*, for the defendant. An agreement to take debentures is an agreement to lend money on security. It is not disputed that for breach of such a contract the lender may be liable to an action for damages, but he cannot be forced to lend the money: *Larios* v. *Bonany y Gurety* (1); *Western Wagon and Property Co.* v. *West*. (2) In the latter case it is pointed out that on a contract to make a loan of money the measure of damages is the loss sustained by the breach, and the damages may be merely nominal, and that damages recovered in such a case are not recovered by way of loan, but that the plaintiff puts them in his pocket and keeps them. The plaintiffs in this case gave no evidence of damage; but if the judgment is to stand, they can recover under it, and in subsequent actions, the whole of the unpaid instalments. It would be in point of fact an indirect method of enforcing specific performance of a contract to lend money. [He cited also *Laird* v. *Pim* (3); *Feize* v. *Thompson* (4); *Sichel* v. *Mosenthal*. (5)]

Bigham, Q.C., and *C. Herbert Smith*, for the plaintiffs. This

(1) (1873) L. R. 5 P. C. 346, at p. 354.
(2) [1892] 1 Ch. 271.
(3) (1841) 7 M. & W. 474; 10 L. J. (Ex.) 259.
(4) (1808) 1 Taunt. 121.
(5) (1862) 30 Beav. 371.

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is a case of the sale of a bond to the defendant, and not of borrowing money. Everything has been done to pass the property to the defendant, though the right to possession does not arise till he has paid the instalments. In his hands it would admittedly be a saleable security, and it is submitted that it is so before it reaches his hands. If the plaintiffs held similar bonds of another company they could sell them, and instead of dealing in the bonds of other companies they deal in their own. The contract is not a mere contract to lend money, for it deals with other rights, such as the conversion of the bonds into shares at the option of the purchaser.

Gore Brown, in reply.

Cur. adv. vult.

April 12. LOPES L.J. read the following judgment:—The plaintiffs' claim is for (1.) specific performance of an agreement dated September 24, 1895, for payment of instalments due upon certain debentures of the plaintiff company applied for by the defendant, or (2.) payment of the balance of the price of the debentures, and (3.) damages.

The learned judge has decided the case in favour of the plaintiffs on the ground that their claim is a debt, and judgment has been entered for 520*l*.

Is it a contract to pay a specified sum, or only a contract to make a loan of money?

The defendant applied for debentures according to the following form: "To the directors of the South African Territories, Limited. Gentlemen,—Having paid to your bankers the sum of £ , being a deposit of £5 per debenture on debentures of the above named company on the terms of your debenture prospectus, dated the 21st September, 1895, I request you to allot me that number of debentures, and I agree to accept the same, or any less amount that may be allotted to me, on the terms of the prospectus dated 21st September, 1895, and I agree to pay the further instalments due thereon in accordance with the terms of the said prospectus." This application was filled in and signed by the defendant. The plaintiff company in accordance with such request on October 5,

1896, duly allotted to the defendant sixteen debentures of the company on the said terms, and the defendant was duly informed of such allotment. The defendant has paid the sum of 80*l.* under the terms of the contract, but has not paid any further sum either for allotment or by way of instalment.

If the contract is to make a loan, that specific performance will not lie is too clear for argument. We must look at the agreement as a whole. Surely in its very nature it is a contract to lend money for a certain fixed period to the company, the payment to be made in the way specified.

On a contract to lend money, no action will lie for the money; an action will only lie for breach of the contract. The borrower may go into the market the next day after breach, and get the money without incurring any loss, or he may not be able to get it without suffering a loss, in which case the measure of the damages is the loss he suffers. My brother Chitty puts the matter very clearly in *Western Wagon and Property Co.* v. *West* (1): "It was contended for the plaintiffs that on a contract to make a loan the measure of damages for breach was the sum agreed to be lent, and that the damages were thus liquidated and ascertained. . . . On a contract to make a loan of money, the measure of damages is the loss sustained by the breach, and the damages may be merely nominal. For instance, if A. agrees to lend B. £100 at interest for a week, and makes default, and B. within a few minutes after the time at which the £100 ought to have been lent, obtains from his bankers a loan of £100 at the same rate of interest and for the same period of time, the damages would be merely nominal. Damages recovered are not recovered by way of loan; the plaintiff puts them in his pocket and keeps them."

I cannot understand how the learned judge in the Court below decided that the plaintiffs were entitled to judgment for 520*l.*, the amount of the instalments up to the time of action brought, that is, in reality, to specific performance. In my judgment the contract is a contract for a loan, and on the breach damages only are recoverable.

I think, therefore, that the judgment should be reversed.

(1) [1892] 1 Ch. 271, at p. 277.

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CHITTY L.J. read the following judgment:—The contract between the parties was that the defendant would lend and the plaintiff company would borrow money on security. It was constituted in this way. [The Lord Justice then stated the facts as above set out, and continued:—]

It is clear that no specific performance of a contract to lend and borrow money can be granted at the suit either of the proposed lender or the proposed borrower. It is immaterial whether the loan is to be on security or without security, or whether the loan is to be for a fixed period; and it can make no difference whether the loan is to be made in one sum or by instalments.

As regards the claim for the alleged price of the debentures, the contract is not, and cannot be read as, a contract for sale. The company were not selling their own debentures, but were offering them as the security for the money they were borrowing. The debentures would contain a covenant to repay and a charge by way of security. A loan on the borrower's bond or covenant is not a purchase of the bond or covenant.

By the application form which he signed the defendant agreed to pay the further instalments in accordance with the terms of the prospectus. It was urged that an action would lie on this promise, and that accordingly the plaintiffs were entitled to recover the unpaid instalments as a debt. But the promise cannot, in my opinion, be isolated from the other terms of the contract, and the promise was neither more nor less than a promise to lend the instalments. For these reasons the first and second grounds of claim cannot be supported.

The plaintiffs are entitled to recover damages for breach of the agreement to make the loan. The damages in such a case may be large or small, or merely nominal, according to the circumstances. The measure of the damages is the loss sustained by the borrower through the breach, the rule in *Hadley* v. *Baxendale* (1) being applied when the circumstances justify its application. If the intended borrower, being a man of good credit, can readily obtain the loan from another person on the same terms, the damages would be nominal. If he

(1) (1854) 9 Ex. 341.

cannot obtain the money except at a higher rate of interest, or for a shorter term of years, or upon other more onerous terms, the damages would be greater and might be very substantial. The burden of proving the amount of the loss sustained rests on the plaintiff. In this case no such evidence was adduced. The sum recovered by way of damages for breach of a contract to make a loan does not constitute a loan: it is merely the damages for not making the loan. The plaintiff is entitled under such a judgment to put the sum into his own pocket and keep it; the defendant could never recover it as money lent or otherwise. The judgment is for 520*l.*, the full amount of the instalments due. If it stands, the defendant will be in a much worse position than he would be under a decree for specific performance. Under such a decree he would be ordered to pay the instalments as they fell due, but as a loan, and he would be entitled to the security contracted for, and he would be entitled eventually to have the loan repaid. Under the judgment he will not be entitled to get back a penny of the money.

As there was no evidence of any special loss sustained by the plaintiffs, the damages must be reduced to a nominal sum.

LOPES L.J. The Master of the Rolls concurs in this judgment.

Appeal allowed.

Solicitors for plaintiffs: *Pyke & Voules.*

Solicitors for defendant: *Rainger, Burton & Co.*

A. M.

1897
April 1.

ATTORNEY-GENERAL *v.* FAIRLEY.

Revenue—Settlement Estate Duty—Contingent Settlement—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 1 (*a*)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1.

Property which is contingently settled is not the less liable to settlement estate duty under s. 5 of the Finance Act, 1894, because the contingency may never arise.

A testator left his residuary estate in trust for all his children who should attain the age of twenty-one years, or being daughters should marry under that age, in equal shares, and directed the trustees to retain the share of each daughter and pay the income thereof to such daughter for her life, and after her death to hold it in trust for her children. The testator died leaving two sons and one daughter surviving him, all being under the age of twenty-one years and unmarried:—

Held, that as there was a chance of the sons dying under the age of twenty-one, and of their shares becoming subject to the trusts of the daughter's settlement, settlement estate duty was payable on the whole of the testator's residuary estate.

Information by the Attorney-General against the executors of John Dalziel Fairley, claiming that upon the death of the testator settlement estate duty became payable under the provisions of the Finance Act, 1894, upon the whole of his residuary estate.

The testator died on November 7, 1895. By his will he appointed the defendants executors and trustees of his will, and directed that the said trustees should stand possessed of his residuary estate in trust to pay the income thereof to his wife during her life, and after her decease in trust for all his children who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry under that age, in equal shares. Provided that the trustees should retain the share of each of his daughters upon trust to pay the income thereof to his same daughter for life, for her sole and separate use, and from and after her death in trust for the children of his same daughter in such shares and in such manner as therein provided; and in case there should be no child of the same daughter, then upon such trusts and in such manner as the same daughter should by deed or will appoint; and in default

of appointment, in trust for the testator's other children who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares, the shares accruing to daughters to be subject to the trusts thereby declared concerning their original shares.

The testator left surviving him his wife and three children, namely, two sons and one daughter. At the date of his death both the sons and the daughter were under the age of twenty-one years and unmarried. Under these circumstances the Commissioners of Inland Revenue claimed settlement estate duty under s. 5, sub-s. 1, of the Finance Act, 1894, upon the whole of the testator's residuary estate.

Sir R. Webster, *A.-G.*, *Sir R. B. Finlay*, *S.-G.*, and *Vaughan Hawkins*, for the Crown. The whole estate is "settled property" within the meaning of s. 5, sub-s. 1 (*a*). (1) By s. 22 that expression is defined to mean any property comprised in an instrument which would be a settlement under the Settled Land Act, 1882. And by s. 2, sub-s. 1, of that Act, a "settlement" means any instrument by which an estate or interest is limited to or in trust for any persons "by way of succession." If the life interest of the widow is to be treated as the only life

(1) By s. 5, sub-s. 1, of the Finance Act, 1894, "Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property,—

"(*a*) A further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased."

By s. 22, sub-s. 1 (*h*), "The expression 'settled property' means property comprised in a settlement."

"(*i*) The expression 'settlement' means any instrument whether relating to real property or personal property which is a settlement within the meaning of s. 2 of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section."

By s. 2, sub-s. 1, of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), "Any deed will . . . . or other instrument . . . . under or by virtue of which instrument . . . . any land or any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession creates or is for purposes of this Act a settlement and is in this Act referred to as a settlement."

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interest created by the will, it is admitted that the succession in the present case does not consist in the postponement of the children's interests till after that of the widow, for by the express terms of s. 5 of the Finance Act the widow's life interest, if the only one, is to be disregarded. But there is a succession of the children inter se. If any one child of the testator dies under twenty-one the enlargement of the shares of the other children would be "by way of succession": *In re Goodwin's Settled Estates.* (1) The chance of any one child getting more than one-third would be itself a succession: *In re Shepheard's Settled Estate* (2); *Collett* v. *Collett* (3); *Dixie* v. *Dixie.* (4) Secondly, the daughter has a chance of getting the whole fund, and if she does so, the whole will be subject to her settlement, in which case the whole would be limited by way of succession as between her and her children. The fact that her settlement would only contingently attach to her brothers' shares does not make those shares the less liable to duty. The duty is payable at the date of the testator's death, and the Crown is not to wait to see whether the contingency happens. Thirdly, the life interest given to the widow is not the only life interest given by the will, for a life interest in one third share is expressly given to the daughter. It is not necessary in order to take the case out of the exception in s. 5 that the second life interest should be a life interest in the whole fund.

Warrington, Q.C., and *Dibdin*, for the defendants. It is admitted that the defendants are liable to pay duty on the daughter's share plus the present market value (if any) of the chance of her taking the sons' shares. But except to that extent the case comes within the exception in s. 5, sub-s. 1 (*a*), the only life interest in the sons' shares being that of the widow. Interests arising by accruer as between the testator's children, by reason of the death of one or other of them under twenty-one, are not interests arising "by way of succession": *In re Burdin's Will.* (5) Secondly, property which is only contingently settled is not settled property within the meaning of

(1) (1862) 3 Giff. 620.
(2) (1869) L. R. 8 Eq. 571.
(3) (1866) L. R. 2 Eq. 203.
(4) W. N. (1881) 49.
(5) (1859) 28 L. J. (Ch.) 840.

the Act, for it may be that the settlement will never attach to it. The same argument which is used to shew that the sons' shares are liable to the duty may be used to shew that even the daughter's share is exempt from it; for if she died under twenty-one her brothers on attaining that age ought to take the whole fund free from any settlement at all.

VAUGHAN WILLIAMS J. In my judgment the settlement estate duty imposed by the 5th section is a duty imposed on that part of the property which is settled, and not on the whole estate if only part of that estate is settled. Secondly, in my judgment a contingent settlement of the whole or part is a settlement of the whole or part as the case may be, and not the less so because there may be by the same instrument a prior disposition of the same property or part of the property, the continuance of which would exclude the contingent settlement altogether. Thirdly, I think the existence of such a contingent settlement for a life estate and estates in remainder excludes the defendants from the benefit of the exception in s. 5. And, lastly, I think that a settlement of a part of an estate (in this case the daughter's third), together with a contingent settlement of the residue (in this case of the brothers' two-thirds), constitutes for the purposes of the Finance Act a settlement of the whole estate.

KENNEDY J. I concur entirely in that view. I agree with the whole of my brother's judgment, and for myself shall be content to state the last proposition, that the settlement of a part of an estate, such as the daughter's third, coupled with a contingent settlement of the residue of the estate, such as the brothers' two-thirds, ought for the purposes of this Act to be treated as a settlement of the whole estate.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor to Inland Revenue.*

Solicitors for defendants: *Hewitt & Urquhart, for Doyle & Bowden, Manchester.*

J. F. C.

C. A.
1897
April 2.

[IN THE COURT OF APPEAL.]

COBURN *v.* COLLEDGE.

Limitations, Statute of—Solicitor's Bill of Costs—Period of Limitation—Cause of Action, Accrual of—Absence beyond Seas—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—4 *&* 5 *Anne*, *c.* 16, *s.* 19—*Solicitors Act*, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37.

In the case of a solicitor's costs the cause of action arises when the work is completed, and therefore the Statute of Limitations begins to run from that time, and not from the expiration of a month from the delivery of the bill of costs.

APPEAL from the judgment of Charles J. at the trial before him without a jury.

The action was by a solicitor for the amount of a bill of costs. The defendant set up the Statute of Limitations. The plaintiff had done certain work for the defendant as his solicitor, which was completed on May 30, 1889. On June 7 following the defendant left England and went beyond the seas. On June 12 the plaintiff posted a letter, containing his signed bill of costs in respect of the work done, addressed to the defendant at the address which the defendant had given, namely, at his father-in-law's house in Guernsey. This letter reached the defendant in Australia in 1891. The defendant returned to England in 1896, and on June 12, 1896, the action was commenced. The learned judge held that the Statute of Limitations began to run as soon as the work was completed, at which time the defendant was in this country, and consequently the plaintiff's right of action was barred. He therefore gave judgment for the defendant. (1)

(1) By the Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3, all actions of (inter alia) debt grounded upon any lending or contract without specialty are to be commenced within six years "next after the cause of such actions." By 4 & 5 Anne, c. 16, s. 19, it is provided, "if any person or persons . . . . against whom there shall be any cause of action . . . . of debt grounded upon any lending or contract without specialty . . . . be or shall be at the time of any such cause of suit or action given or accrued, fallen or come, beyond the seas, that then such person or persons who is or shall be entitled

Atherley Jones, Q.C., and *H. M. Sturges*, for the plaintiff. At the time when the work was completed, the defendant was in this country; and, consequently, if the cause of action accrued then, the case does not come within the statute of Anne, and the plaintiff's right of action is barred by the statute of James. But it is contended that the cause of action can only be said to accrue within the meaning of the Statutes of Limitation when there is a complete and effective right of action. By reason of s. 37 of the Solicitors Act, 1843, the plaintiff had no right of action for these costs until a month had elapsed from the delivery of a signed bill of costs. If the cause of action accrued at that period, the plaintiff's right of action is not barred, because the defendant was then beyond the seas, and the action has been brought within six years of his return. The cause of action includes all the facts which must be proved by the plaintiff in order to support the action: *Cooke* v. *Gill* (1); *Read* v. *Brown*. (2)

[LOPES L.J. According to the old forms of pleading in Bullen and Leake, the plaintiff in such a case as this would have sued on an indebitatus count for work done as a solicitor,

to any such suit or action shall be at liberty to bring the said actions against such person and persons after their return from beyond the seas, so as they take the same after their return from beyond the seas within such times as are respectively limited for the bringing of the said actions before by this Act and by the said other Act made in the 21 Jac. 1." By the Solicitors Act, 1843, s. 37, it is provided (inter alia) that "No attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator, or assignee of any such attorney or solicitor, or be inclosed in or accompanied by a letter subscribed in like manner referring to such bill."

(1) (1873) L. R. 8 C. P. 107.

(2) (1888) 22 Q. B. D. 128.

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and it would have been for the defendant to plead that no bill had been delivered before action.]

In *Reeves* v. *Butcher* (1) Lindley L.J. said that the cause of action arises at the time when the debt could first have been recovered by action; and that the statute runs from the earliest time at which an action could be brought.

If there can be said to be a cause of action before delivery of a bill, it must be treated as suspended by the operation of the Solicitors Act until a month after the expiration of a reasonable period for delivery of a bill; and therefore the statute cannot be considered as beginning to run till that period has elapsed; as in the case of goods sold for which a bill of exchange has been given on account, where the cause of action is suspended during the currency of the bill, and the statute would not begin to run until dishonour of the bill.

[LORD ESHER M.R. In that case it would be a term of the contract between the parties that credit should be given, and of course the price of the goods would not be due until the credit had expired.]

Having regard to the provisions of the Solicitors Act, 1843, the contract with the solicitor must be taken to be to pay a month after the delivery of the bill. The Act in substance compels a solicitor to give a month's credit.

[They also cited *In re Kensington Station Act* (2); *In re Crosley* (3); *Murray* v. *East India Co.* (4)]

Jelf, *Q.C.*, and *F. M. Abrahams*, for the defendant. It is difficult to see how there can be a suspension of the cause of action as suggested. Either there is a cause of action as soon as the work is done, or it does not come into existence until the expiration of a month from the delivery of a bill. It is contended that the cause of action in this case was money payable for work and labour, which cause of action came into existence as soon as the work was done, and that delivery of the bill is no part of the cause of action. The cause of action only includes those facts which the plaintiff must allege and prove as part of

(1) [1891] 2 Q. B. 509.
(2) (1875) L. R. 20 Eq. 197.
(3) (1887) 35 Ch. D. 266.
(4) (1821) 5 B. & Ald. 204.

his case: see per Lord Esher M.R. in *Read* v. *Brown*. (1) If the defendant does not set up the non-delivery of a bill, the plaintiff will shew a perfectly good cause of action by merely shewing that the work was done at the defendant's request. The provisions of s. 37 of the Solicitors Act, 1843, only relate to matters of procedure preliminary to bringing the action. They do not affect the cause of action, but only the remedy in respect of it. If the contention for the plaintiff is right, the solicitor might delay delivery of his bill of costs for any time, and so prevent the statute from beginning to run. By 38 & 39 Vict. c. 79, s. 2, a judge may give leave to a solicitor to bring his action before the expiration of the month, which shews that the cause of action already exists.

[They also cited *Ingle* v. *McCutchan*. (2)]

Atherley Jones, Q.C., in reply.

LORD ESHER M.R. I think that this appeal fails. It is admitted that, if the cause of action in this case must be considered to have arisen when the work was completed, the defendant must succeed; but, if it must be considered as having arisen only at the expiration of the period of one month from the delivery of the signed bill of costs, the plaintiff must succeed. It does not appear to me that there is any question as to the construction of the Statutes of Limitation. It is plain that under them the action must be brought within six years after the cause of action arises, unless the defendant is beyond the seas when the cause of action arises, in which case it must be brought within six years of his return. The question is when in such a case as this the cause of action arises. The action is brought by the plaintiff in respect of work done by him as a solicitor. In the case of a person who is not a solicitor, and who does work for another person at his request on the terms that he is to be paid for it, unless there is some special term of the agreement to the contrary, his right to payment arises as soon as the work is done; and thereupon he can at once bring his action. Before any enactment existed

(1) 22 Q. B. D. 128. (2) (1884) 12 Q. B. D. 518.

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with regard to actions by solicitors for their costs, a solicitor stood in the same position as any other person who has done work for another at his request, and could sue as soon as the work which he was retained to do was finished, without having delivered any signed bill of costs or waiting for any time after the delivery of such a bill. Then to what extent does the statute alter the right of the solicitor in such a case, and does the alteration made by it affect or alter the cause of action? It takes away, no doubt, the right of the solicitor to bring an action directly the work is done, but it does not take away his right to payment for it, which is the cause of action. The Statute of Limitations itself does not affect the right to payment, but only affects the procedure for enforcing it in the event of dispute or refusal to pay. Similarly, I think s. 37 of the Solicitors Act, 1843, deals, not with the right of the solicitor, but with the procedure to enforce that right. It does not provide that no solicitor shall have any cause of action in respect of his costs or any right to be paid till the expiration of a month from his delivering a signed bill of costs, but merely that he shall not commence or maintain any action for the recovery of fees, charges, or disbursements until then. It assumes that he has a right to be paid the fees, charges, and disbursements, but provides that he shall not bring an action to enforce that right until certain preliminary requirements have been satisfied. If the solicitor has any other mode of enforcing his right than by action, the section does not seem to interfere with it. For instance, if he has money of the client in his hands not entrusted to him for any specific purpose, there is nothing in the section to prevent his retaining the amount due to him out of that money. If that be the true construction of the section, it does not touch the cause of action, but only the remedy for enforcing it. The definition of "cause of action" which I gave in *Read* v. *Brown* (1) has been cited. I there said that it is "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court." The language I used obviously

(1) 22 Q. B. D. 128.

means this: the plaintiff in order to make out a cause of action must assert certain facts which, if traversed, he would be put to prove. It is well known, of course, that any of those facts which is not traversed is taken to be admitted. The words "if traversed" were inserted to make it clear that the facts spoken of were those which the plaintiff must allege in his statement of claim as it is now called, or his declaration as it used to be called. In former times, if he failed to assert any of those facts, his declaration was demurrable as shewing no cause of action. If he asserted those facts, and they were traversed, it lay upon him to prove them. If any of them were not traversed, he need not of course prove them. I adhere to the definition of "cause of action" which I then gave, and which was assented to by Fry and Lopes L.JJ. It has been suggested that it is inconsistent with the effect of what was said by Lindley L.J., in *Reeves* v. *Butcher*. (1) But I do not think there is really any such inconsistency as was suggested. If the plaintiff alleges the facts which, if not traversed, would primâ facie entitle him to recover, then I think he makes out a cause of action. Applying that to a case like the present, when the plaintiff had completed the work, under the old course of pleading, alluded to by my brother Lopes, he could have brought his action, declaring for money payable for work and labour done at the request of the defendant; and, if the defendant made no answer to that claim, he would have been entitled to recover. The defendant could not have demurred to the plaintiff's declaration, which would have shewn a perfectly good cause of action, and, unless the defendant set up something to defeat the claim, the action would have been maintainable. Therefore, as soon as the solicitor had done the work, he could have maintained his cause of action for work and labour. The defendant might plead that no bill of costs had been delivered, but that would only be by way of answer to a case which constituted a good cause of action. For these reasons I think that the cause of action in this case, to use the language of the statute of Anne, was "given, accrued, fallen or come" the moment that the work which the plaintiff was retained to do was completed.

(1) [1891] 2 Q. B. 509.

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LOPES L.J. I am of the same opinion. The question raised is really whether the time within which an action such as this may be brought runs from the completion of the work or from the expiration of one month from the delivery of the bill of costs under s. 37 of the Solicitors Act, 1843. If it runs from the completion of the work, the defendant must succeed. If it runs from the expiration of one month from delivery of the bill, the plaintiff must succeed. The effect of the Statutes of Limitation (21 Jac. 1 and 4 & 5 Anne) is that the action must be brought within the period of six years from the time when the cause of action arose, subject to the provision that the period of limitation does not begin to run during the absence of the person against whom the cause of action exists beyond the seas. It was contended for the defendant that the cause of action in this case arose as soon as the work was completed. I am of opinion that that contention is correct for these reasons. Before the passing of any enactment with regard to actions by solicitors for costs, immediately upon the completion of work done by a solicitor, a debt arose for which an action could be brought without delivery of any bill of costs. It is useful for the purposes of the present case to consider what under the old rules of pleading before the Judicature Act the course of pleading in such an action would have been. The solicitor would have sued in indebitatus assumpsit or on a common money count for work and labour. If the defendant had pleaded merely "never indebted," and the case had gone to trial on those pleadings, the cause of action would have been said to have arisen as soon as the work was done. If the defendant intended to raise any defence on the ground of non-delivery of a signed bill of costs, he must plead that such a bill had not been delivered. The delivery of the bill formed no part of the plaintiff's cause of action. Upon proof that the work had been done, primâ facie the plaintiff was entitled to recover. It was for the defendant to set up by his pleading that no bill had been delivered. How, then, can it be said that the cause of action is not complete before the delivery of a signed bill? If that were so, it would have been necessary for the plaintiff to allege in his declaration that such

a bill had been delivered. No one ever heard of a declaration in such a form. These considerations make it clear to me that the cause of action in such a case accrues as soon as the work is completed. Sect. 37 of the Solicitors Act, 1843, appears to me to assume that there is a cause of action, and merely to postpone the bringing of an action upon it until the period of one month from the delivery of the bill. There is nothing in the section, so far as I can see, inconsistent with the view that the cause of action arises when the work is completed. It was urged that, if this construction were adopted, a solicitor would have a shorter time during which he may abstain from bringing his action for work done than the rest of Her Majesty's subjects. That may be so; but on the other hand, if the plaintiff's contention is correct, the solicitor may abstain from delivering his bill for twenty years, and then at the end of that time he may deliver it and sue after the expiration of a month from its delivery. It seems to me that that would be a very anomalous and inconvenient result. Definitions of "cause of action," given in sundry cases, have been referred to, particularly that given by the Master of the Rolls in *Read* v. *Brown*. (1) I still agree with that definition, and I do not see any real inconsistency between it and what was said by Lindley L.J. in *Reeves* v. *Butcher*. (2) I have mentioned the matter to the learned Lord Justice, and he says that in saying what he there said he did not contemplate a case like the present.

CHITTY L.J. I also think that the appeal fails. The object of the Statute of Limitations (21 Jac. 1, c. 16) was to afford a certain amount of protection against stale demands. I say to afford a certain amount of protection, because the statute does not bar the debt, but only takes away the remedy by action. The statute therefore makes a distinction between the action and the cause of action. There does not appear to me to be any substantial difference for the present purpose between the language of the statute of James I. and that of the statute of Anne. The question in this case is when the cause of action

(1) 22 Q. B. D. 128. (2) [1891] 2 Q. B. 509.

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arose. It was said on the one side that it only arose a month after the signed bill was delivered. That argument was based upon s. 37 of 6 & 7 Vict. c. 73. That enactment, like the Statute of Limitations, appears to me only to establish a limitation with regard to the remedy; it in no way affects the cause of action, which is money payable for work done, but only postpones the right of action upon it for at least one month from the delivery of the bill. My brother Lopes has referred to Bullen and Leake on Pleading. I will refer to an older work on the same subject, namely, Chitty on Pleading. (1) I will not read the form of declaration which is there given as applicable to such a case as this, but it is clear that the framer of it did not think it necessary to allege the delivery of a signed bill, and the lapse of a month from that delivery, as part of the plaintiff's cause of action. I should not refer to a book on pleadings to ascertain the true view of this matter, were it not that in those days pleaders had to be very careful in alleging all the facts necessary to constitute a cause of action, and therefore the form of the pleading is material to shew what the cause of action is in such a case as this. I accept the definition of "cause of action" given by the Master of the Rolls and assented to by the other members of this Court in *Read* v. *Brown* (2), and I am satisfied that nothing was said by Lindley L.J. in *Reeves* v. *Butcher* (3) which was intended to alter that definition. As has been pointed out, the result of our decision is that a solicitor has only five years and eleven months within which to sue for the amount of his bill of costs. I do not shrink from that result. It is no doubt a restriction imposed upon him. But it is so imposed for the protection of his clients; and on the other hand, if the contention for the plaintiff were successful, it would follow that a solicitor might postpone for any time the delivery of his bill of costs, and so prevent the statute from beginning to run. It was suggested that he must deliver it within a reasonable time, but that suggestion is contrary to the whole scope of the Statutes of Limitation, which is, that, instead of its being left in case of

(1) 2 Chitty on Pleading, 54; 7th edition by Greening, published in 1844.

(2) 22 Q. B. D. 128.

(3) [1891] 2 Q. B. 509.

delay to the Court to say what is unreasonable delay, as occurred sometimes in cases in the Court of Chancery, a fixed period should be laid down by enactment. Again, it is impossible to find in the language of the Solicitors Act, 1843, any such proposition as that the solicitor must deliver his bill within a reasonable time. There is one matter to which I may allude by way of illustration, although I know the danger of analogies. An author whose copyright is infringed has an immediate right of action for infringement, but by s. 24 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), it is provided that no proprietor of copyright in any book published after the passing of the Act shall maintain any action or suit in respect of any infringement of such copyright, unless he shall, before commencing such action or suit, have caused an entry to be made in the register of the Stationers' Company of such book pursuant to the Act. The words of the section are very similar to those of the Solicitors Act, 1843. I cannot see, if the contention for the plaintiff in this case is correct, why the author in a case of infringement should not wait for twenty years and then register his copyright and bring his action. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *H. J. Coburn.*
Solicitors for defendant: *Blair & W. B. Girling.*

E. L.

1897
April 2.

[COMMERCIAL COURT.]

EDWARDS *v.* STEEL, YOUNG & CO.

Ship—Seamen—Termination of Service—"Passage Home," what is—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 186.

By s. 186 of the Merchant Shipping Act, 1894, when the service of any seaman belonging to any British ship terminates at any port out of Her Majesty's dominions, the master, besides paying the seaman's wages, shall, as one of several specified alternatives, "provide him with a passage home."

A seaman living at West Hartlepool shipped there for a voyage to foreign ports under articles which provided that he might be discharged at any port between the Elbe and Brest, or at a port in the United Kingdom. He was discharged at Antwerp, and provided with a passage from Antwerp to Grimsby:—

Held, that he had been provided with a "passage home" within the meaning of s. 186.

ACTION to recover, under s. 186 of the Merchant Shipping Act, 1894 (1), expenses incurred by the plaintiff by reason of

(1) The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 186:—

"(1.) In the following cases; namely,—

"(*b*) Where the service of any seaman or apprentice belonging to any British ship terminates at any port out of Her Majesty's dominions;

"(2.) The master shall . . . . besides paying the wages to which the seaman or apprentice is entitled, either

"(*a*) provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman, or

"(*b*) furnish the means of sending him back to some such port, or

"(*c*) provide him with a passage home, or

"(*d*) deposit with the consular officer . . . . such a sum of money as is by the officer deemed sufficient to defray the expenses of his maintenance and passage home."

"(4.) If the master fails, without reasonable cause, to comply with any requirement of this section, the expenses of maintenance or passage home (*a*) if defrayed by the seaman or apprentice shall be recoverable as wages due to him."

Sect. 134 contains provisions with respect to the payment of the wages of seamen in foreign-going ships, and (*c*) provides:

"In the event of the seaman's wages or any part thereof not being paid or settled as in this section mentioned, then, unless the delay is due to the act or default of the seaman, or to any

the master of the defendants' ship, in which the plaintiff was employed as a seaman, having, on the discharge of the plaintiff at a foreign port from his employment, wrongfully failed to comply with the provisions of that section, and for sums alleged to be due to the plaintiff as wages.

The plaintiff was a seaman living at West Hartlepool, and in July, 1896, at West Hartlepool, he signed articles for a voyage in the British steamship *Capenor*, belonging to the defendants, from West Hartlepool to Madeira and other places, the plaintiff to be discharged between the Elbe and Brest, or at any port in the United Kingdom at the master's option. The plaintiff was to receive wages at the rate of 4*l.* per month and rations. The crew were discharged on November 27 after the arrival of the ship at Antwerp. They remained on board that night, and on the following day they, together with the master of the ship, attended before the consul for the purpose of being paid their wages. There was a conflict of evidence as to what took place before the consul. The evidence of the plaintiff and another witness, taken on commission, was to the effect that the plaintiff requested the master to send him home to where he came from, West Hartlepool, and also to defray the expenses of his maintenance until he should arrive at that port; that the master refused to comply with this request; declined to do more than send the plaintiff to the port of Grimsby, and accordingly provided him with an order for a voyage, without rations, to Grimsby. The master of the ship was, however, called as a witness for the defendants, and his evidence was that no such request was made; that he had a conversation with the consul, when the latter said that the men should be paid if the master would give a guarantee to pay the expenses of their passage home; that he (the master) gave the guarantee required, and took no further part in the matter; that the consul thereupon arranged with the men to pay off their wages, and to provide them with a passage home, offering to them all a passage to Grimsby, which they all accepted. The men's

reasonable dispute as to liability, or to any other cause not being the wrongful act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof."

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wages up to the date of their discharge were paid, and the consul made out and handed to them vouchers for their passages to Grimsby. The master subsequently paid to the consul the guaranteed sum for the expenses of their passage home. The ship by which the men were conveyed from Antwerp to Grimsby did not sail until the following day, and the passage did not include food. On arriving at Grimsby the plaintiff had to pay his railway fare from that place to his home at West Hartlepool.

The plaintiff's particulars of claim were:—

"Maintenance and lodgings at Antwerp from time of discharge to departure for Grimsby, 10*s*.

"Maintenance on the voyage from Antwerp to Grimsby, 3*s*. 6*d*.

"Train fare from Grimsby to West Hartlepool, 9*s*. 10*d*.

"Plaintiff claims 1*l*. 3*s*. 4*d*., and wages at the rate of 2*s*. 8*d*. per day, and rations at the rate of 2*s*. 4*d*. per day from date of discharge until payment or judgment."

Robson, Q.C., and *J. D. A. Johnson*, for the plaintiff.

Joseph Walton, Q.C., and *Lewis Noad*, for the defendants.

The arguments of counsel on the construction of the statute sufficiently appear from the judgment of Collins J.

COLLINS J. This is an action by a seaman whose service in the ship in which he was employed terminated at Antwerp, and he claims to be reimbursed his expenses of maintenance prior to and during his passage from Antwerp to Grimsby, and his railway fare from Grimsby to West Hartlepool. He also claims a sum per diem as wages from the date of his return to England until payment or judgment, upon the ground that under the particular provisions of the Merchant Shipping Act, 1894, the expenses of his maintenance are wages which continue to run and be payable until the final settlement thereof.

[The learned judge referred to the facts and evidence.]

The question arises whether the master in doing what he did at Antwerp satisfied the alternative provisions of sub-s. 2 (*a*), (*b*), (*c*), or (*d*) of s. 186 of the Merchant Shipping Act, 1894.

The plaintiff's case is that none of those provisions have been complied with, because all that was done was to give him a passage from Antwerp to Grimsby, and no provision to defray the expenses of his maintenance was made. On the other hand, the defendants contend that they have satisfied their obligation under sub-s. 2. As to the first alternative, (*a*), there was no British ship at that time bound from Antwerp to Hartlepool, or to a port in the United Kingdom, on board which they could provide him with adequate employment, and therefore it was not possible for them to comply with that alternative. As to (*b*), the defendants say that they did comply with that alternative; that the defendant is not entitled to be put into a better position than he would have been in if the voyage for which he was engaged had ended at Grimsby, which is a port within the United Kingdom, and that by providing for his passage to Grimsby they did "furnish the means of sending him back to some such port" within (*b*). They also contend that they complied with (*c*) by providing him with a "passage home," because that expression embraces a port in the United Kingdom, and a fortiori a port agreed to by the seaman. They further say that they have complied with (*d*) because the master did deposit with the consular officer such a sum as was by that officer deemed sufficient to defray the expenses of the plaintiff's maintenance and passage home; that the consular officer is the person who has to assess the sum, and that the master by giving him a free hand in the matter absolved himself from any further liability. Now, in the view I take of this case, it is not necessary for me to decide all the points which have been raised, but I shall give my opinion upon some of them. I think that the case falls within sub-s. 2 (*d*) of s. 186. I think that the master by giving the undertaking he did give to the consul has in effect satisfied the provisions of clause (*d*). The evidence of the master, which I accept in preference to the statements of the two witnesses for the plaintiff, has satisfied me that the real negotiation with the men was conducted, not by the master, but by the consul. If that be so, it is quite clear that the consul allowed such a sum as he considered necessary to defray the expenses of the men's

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maintenance and passage home, and that the master paid that sum. It was urged on behalf of the plaintiff that there was no deposit of the sum by the master at the time. There was not; but the consul, dealing with a person who, he was satisfied, was perfectly solvent, might fairly, I think, take upon himself to accept the master's undertaking instead of requiring a deposit at the time, and I think there is no substance in that point. But if I am wrong in deciding that the provisions of clause (*d*) were satisfied, I have come to the conclusion that the passage to Grimsby provided for the plaintiff was, under the circumstances of this case, a "passage home" within the meaning of clause (*c*). The opposite view must go this far at least—that a "passage home" in the two sub-divisions of sub-s. 2 means a passage to the port at which the seaman was shipped. I cannot think that the words are meant to bear that interpretation. I do not profess to be able to put a consentaneous and logical interpretation on the expression "passage home" in all the sub-sections in which it occurs, but I think I am justified in saying that it does not mean a passage to the port of shipment. By clause (*a*) the master may find the seaman adequate employment in any British ship bound to "the port in Her Majesty's dominions in which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman." Then clause (*b*) provides for the case where the master does not find him employment, but may furnish the means of sending the seaman back to "some such port"—that is, to one of the places mentioned in clause (*a*); or, by clause (*c*), the master may "provide him with a passage home." If by that the Legislature meant a passage to "the port in Her Majesty's dominions in which he was originally shipped," one cannot see why it should not have said so. It has just before used words which directly indicate a passage to the port of shipment. The same reasoning applies also to the words "passage home" in clause (*d*). Again, some light is thrown upon the matter by s. 191, which deals with shipwrecked seamen, and seamen who, having been engaged to serve in foreign ships, are in distress, and enacts that for the purpose of providing such seaman with a "passage home" the prescribed

authority shall put them on board a British ship "bound either to the United Kingdom, or to the British possession to which the seaman belongs (as the case requires), which is in want of men to make up its complement: or if there is no such ship, then the authority shall provide the seaman with a passage home as soon as possible in any ship, British or foreign, bound as aforesaid." I cannot, therefore, find in this Act of Parliament that the word "home" means the port at which the seaman was originally shipped. I am not called upon to give a general definition of the meaning of "passage home"; it is enough to say that, the port of Grimsby being a port within the ambit which is subject to the contract made with the plaintiff, and being a port within the United Kingdom, a passage to Grimsby was a passage home within sub-s. 2 (*c*) of s. 186. As to the plaintiff's claim for maintenance, I think it must stand or fall by my conclusion of fact as to whether the provisions of clause (*d*) were complied with by the master. Apart from that clause, I should think that a passage home must involve maintaining the person for whom it is provided; but holding, as I do, that the case comes under clause (*d*), I am of opinion that when the consul fixed the sum which he considered sufficient to defray the expenses of the plaintiff's maintenance and passage home, and the master paid that sum, the defendants' liability for maintenance ceased.

I also express my opinion that sub-s. 4 (*a*) of s. 186 does not make the expenses of the seaman's maintenance and passage home, when defrayed by him, wages. It does not make them what they are not. They are not constituted wages, and do not accrue de die in diem as though they were. Sect. 134, therefore, does not apply to them. I am of opinion that the defendants are entitled to my judgment.

Judgment for defendants.

Solicitors for plaintiff: *Pattinson & Brewer.*
Solicitors for defendants: *W. A. Crump & Son.*

W. A.

1897
April 3.

PRATT *v.* SOUTH EASTERN RAILWAY COMPANY.

Railway—Passenger's Luggage—Cloak-room—Bailment— Ticket — Condition exempting from Responsibility for Articles above a certain Value—Damage to Article deposited.

A condition upon a cloak-room ticket issued by a railway company that they "will not be responsible for any package exceeding the value of 10*l.*" protects the company from liability, not only for the loss of an article deposited in the cloak-room, but also for damage or injury thereto while in their custody.

APPEAL from a decision of the deputy judge of the Southwark County Court.

The action was brought to recover damages for injury to a gun deposited by the plaintiff in the cloak-room of the defendants, and injured by the negligence of their servants while in their custody. When the gun, which was worth more than 10*l.*, was deposited by the plaintiff, a ticket was handed to him; a notice was printed in red ink on the face of the ticket, and also in black ink on the back; the following are the material portions of the notice.

"Important Notice.

"The company will not be responsible for articles left by passengers at the station unless the same be duly registered, for which a charge of 2*d.* per article will be made, and a ticket given in exchange; and no article will be given up without the production of the ticket, or satisfactory evidence of the ownership being adduced. A charge of 1*d.* per diem, in addition, will be made on all articles left in the luggage room for a longer period than 24 hours. The company will not be responsible for any package exceeding the value of 10*l.*"

At the trial the defendants contended that the ticket protected them from liability for damage or injury to articles above the value of 10*l.*, as well as from liability for their loss; the plaintiff contended that it protected the defendants against loss

of the article only. The learned judge found that the gun was injured by the carelessness of the defendants' servants; that the conditions on the ticket were binding on the plaintiff, but that they only protected the defendants against the loss of the article itself, and not against damage or injury to the article while in their custody; he therefore gave judgment for the plaintiff for five guineas and costs. The defendants appealed.

Reginald Brown (*Archibald Willis* with him), for the defendants. The learned county court judge has placed too narrow a construction on the condition. Upon a reasonable construction it extends to protect the defendants from liability for damage to, as well as for the loss of, an article deposited. This very condition has already received judicial interpretation: in *Van Toll* v. *South Eastern Ry. Co.* (1) it was held to cover the loss of part of an article deposited, and in *Pepper* v. *South Eastern Ry. Co.* (2) to cover not only the loss of the article, but also delay in returning it to the owner where not caused by the wilful act of the defendants' servants. In the early part of the notice the defendants say that they will not be "responsible" for articles left at a station unless registered: this means that they will not undertake any liability for articles so left, and covers both loss of, and damage to, the article. The same interpretation must be placed on the word "responsible" at the end of the notice, which therefore means that the defendants will not undertake any liability in respect of an article deposited with them if its value exceeds 10*l*. The plaintiff could have covered this risk by paying a small charge for insurance.

Hume Williams, for the plaintiff. The injury was caused by the careless handling of the gun by the defendants' servants, that is, by their negligence, and the condition does not protect the defendants against the consequence of the negligence of their servants. If the defendants are seeking to impose such a condition on the contract, the onus is upon them to make this abundantly clear, and it cannot be successfully contended that

(1) (1862) 12 C. B. (N.S.) 75. (2) (1868) 17 L. T. (N.S.) 469.

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the language of this condition is so clear as to shew that the plaintiff contracted to relieve the defendants from liability for their servants' negligence. Secondly, it is not a reasonable condition to impose.

[CAVE J. This is a common law contract of bailment, and the question of reasonableness does not arise: if it did, I should say the condition was reasonable. The only question is one of construction.]

The condition cannot extend to cover damage to the article; if it did, it would enable the defendants or their servants to be careless as to what was done with valuable articles deposited with them.

CAVE J. I am of opinion that the judgment of the learned deputy county court judge cannot be supported. The view taken by him was that the word "responsible" meant responsible for loss, and that it did not include responsibility for damage. The result of that view might be, as was pointed out during the argument, that an article of very great value might be irretrievably damaged, and the damage might be really equivalent to its loss, in which case the railway company, because it was damaged and not lost, would be responsible for its full value. I do not think that that is a reasonable interpretation to put upon the language of this ticket. There are words in the early part which cannot be altogether neglected: "the company will not be responsible for articles left by passengers at the station." Now, "responsible" there must mean responsible not only for damage to, but also for the loss of, the article. The company in effect say this: "If you like to go away from the station and leave your articles upon the platform without putting them in the cloak-room, you must not look to us to make good to you any loss or damage which may happen to them while they are so left, not in our charge in a room which we have provided for the purpose; we undertake no responsibility"—that means responsibility of any kind —"for those articles." It seems to me that when the same word occurs lower down in the notice—"the company will not be responsible for an article exceeding the value of 10*l.*"—that

means what in my view it says, that the company undertake no responsibility for any article which is over the value of 10*l*. If it is not over that value, the company do undertake responsibility for it, and they will be responsible either for its loss or for damage to it; but when it exceeds the value of 10*l*. they will undertake no responsibility at all. If it is left there under those circumstances it is done at what is called the owner's risk, and the owner must not look to the company if the article is lost or damaged. That, I think, is the proper construction to place upon the language of the ticket, although I cannot see why the defendants should not have made it a little more distinct by saying that they would not be responsible for loss or injury. It has been suggested that even those words might admit of a difficulty in construction, and doubtless no form of words has ever yet been framed by human ingenuity with regard to which some ingenious counsel could not suggest a difficulty; but that the words "loss or damage" do not cover everything that could happen to one article I am at a loss to understand. It has been suggested that they would not cover a temporary loss; but I cannot understand why a loss is not a loss merely because it is temporary. It seems to be contended that if an article were not restored to the depositor for a fortnight after demand, though not actually lost, the company would be responsible in damages, but that if it were lost altogether they would not be responsible; and yet the only difference between the two cases is that the one is a temporary, and the other a permanent, loss. Both are losses, and if the company declined to be responsible for loss, the natural meaning of that would be that they would not be responsible either for the temporary or permanent loss of the article. But that is not very material for the point in the present case. The question is what is the meaning of the words "will not be responsible," and I think, looking at the way in which the same words are used in the former part of the ticket, and the absence of anything to shew that a different use of them is intended in the latter part, that the best and the correct way to construe them is to hold that they mean that the company will not be responsible at all, and that an article over 10*l*. in

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value is taken in at the owner's risk, and not at the risk of the company.

LAWRANCE J. I entirely agree.

Appeal allowed.

Solicitors for plaintiff: *Keen, Marsland, Bryden & Besant.*
Solicitor for defendants: *J. W. Watkin.*

W. J. B.

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March 31.

THE ATTORNEY-GENERAL *v.* DODINGTON.

Revenue—Estate Duty—Exemption—Settlement of Personal Property—The Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 21 *sub-s.* 1.

By the Finance Act, 1894, s. 21, sub-s. 1, "estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this Act, in respect of which property" probate duty (amongst other specified duties) "has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property." Under a marriage settlement personal property belonging to the wife became vested in trustees upon trust to pay the income to the wife for life, and after her death, if her husband should survive her, upon trust to pay the income to him for life, and after the death of the survivor of them upon trust for such person as the wife should by deed or will appoint. The wife died in the lifetime of her husband before the commencement of the Finance Act, 1894, having by her will appointed the property in favour of certain beneficiaries, and probate duty was thereupon paid by her executors in respect of the value of the property so appointed after deducting the value of the husband's life interest. The husband died after the commencement of the Act:—

Held, that the settlement and will together constituted a "disposition" of the settled property within the meaning of s. 21, sub-s. 1, and, therefore, that estate duty was not payable on the husband's death in respect of the value on which probate duty had been paid.

INFORMATION by the Attorney-General claiming estate duty.

The following material facts appeared from the information and the defendant's answer thereto:—

By an indenture of settlement, dated October 16, 1871, in consideration of the marriage then intended to be and shortly afterwards solemnized between the Rev. William Popham and

Mrs. Elizabeth Frances Bailward, widow, certain personal property to which E. F. Bailward was then entitled in reversion expectant on the death of her aunt, Mrs. Manning, was conveyed to and vested in two trustees (of whom the defendant was one), or the survivor of them, or other the trustees or trustee for the time being of the settlement, upon trust to pay the dividends, interest, and annual or other income thereof unto E. F. Bailward and her assigns for her life for her sole and separate use independent of the debts, control, and engagements of W. Popham, and from and immediately after her decease, in case W. Popham should survive her, then upon trust to pay the said interest, dividends, and annual or other income to W. Popham or his assigns for his life, and from and after the decease of the survivor of them, E. F. Bailward and W. Popham, upon trust for such person or persons and for such ends, intents, and purposes as E. F. Bailward should at any time or times by any deed or deeds, writing or writings, sealed and delivered with or without power of revocation or by will or codicil appoint, and in default of such appointment, and so far as any such appointment should not extend, in trust for E. F. Bailward, her heirs, executors, administrators, and assigns respectively, to the intent that the same, but subject nevertheless to the life interest therein of W. Popham, might be her separate property for her sole and separate use, and might from time to time be, subject as aforesaid, assured, assigned, transferred, disposed of, and dealt with as she should direct.

Mrs. Manning died in 1874, and Mrs. Popham's reversionary interest thereupon fell into possession.

Mrs. Popham died in August, 1883, in the lifetime of her husband. At and after her death the trust funds remaining subject to the trusts of the marriage settlement consisted of about 3792*l.* invested in India 4 per cent. stock and on a mortgage. In 1889 the defendant's co-trustee died, and the defendant became the surviving trustee of the marriage settlement.

By her will, made in 1883, Mrs. Popham appointed that from and after her decease the trustees of her marriage settlement should stand possessed of the trust funds, as to 300*l.* upon

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trust for her husband, W. Popham, and as to the residue, subject to his life interest, upon trust for her children by her first marriage absolutely in certain shares; and upon her death the executors of her will duly paid probate duty, under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), on the sum of 2855*l.*, as being the value of the interest in the trust funds disposed of by her will, less a sum of about 936*l.* calculated as the actuarial value of the life estate of W. Popham.

W. Popham died on August 28, 1894, after the commencement of Part I. of the Finance Act, 1894 (57 & 58 Vict. c. 30); and thereupon the Commissioners of Inland Revenue claimed estate duty, under ss. 1 and 2 of that Act, upon so much of the trust funds as remained subject, at his death, to the trusts of the marriage settlement.

The defendant refused to pay such estate duty, claiming that the trust funds were exempted therefrom by s. 21, sub-s. 1, of the Finance Act, 1894. (1)

(1) The Finance Act, 1894 (57 & 58 Vict. c. 30), Part I., s. 1: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

Sect. 2: "(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . .

"(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . . ."

Sect. 21: "(1.) Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act, in respect of which property any duty mentioned in paragraphs one and two of the first schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property."

Sect. 22: "(1.) In this part of this Act, unless the context otherwise requires: (*a*) The expressions 'deceased person' and 'the deceased' mean a person dying after the commencement of this part of this Act."

Sect. 24: "This part of this Act shall come into operation on the expiration of the first day of August, 1894, in this

The informant prayed that (inter alia) "it might be declared that upon the death of W. Popham estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value of the trust funds remaining subject to the said indenture of October 16, 1871, which passed on his death within the meaning of the said Act"; and that the informant might have such further or other relief in the premises as the case might require.

Sir Richard Webster, A.-G., and *Sir Robert Finlay, S.-G.* (*Vaughan Hawkins* with them), for the Crown. Estate duty is payable upon the principal value of the whole personal property remaining subject to the trusts of the settlement at the time of the death of W. Popham, unless the exemption in s. 21, sub-s. 1, of the Finance Act, 1894, applies to this case. The property was property "which passed" on his death after the commencement of the Act, within the meaning of s. 1 and s. 2, sub-s. 1 (*b*). Sect. 21, sub-s. 1, does not apply. Probate duty has not been paid "in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act" within that section. The "will or disposition" must be a will or disposition by which the property is originally settled. Here the property was not settled by Mrs. Popham's will, which was a mere exercise of the power of appointment given by her marriage settlement. The will was merely the machinery whereby the particular individuals were pointed out who were to take under the settlement, and it was not an instrument "limiting" any property

part of this Act referred to as the commencement of this part of this Act."

The duties mentioned in pars. 1 and 2 of the 1st schedule are:—

Par. 1: "The stamp duties imposed by the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), on the affidavit to be required and received from the person applying for probate or letters of administration in England or Ireland, or on the inventory to be exhibited and recorded in Scotland."

Par. 2: "The stamp duties imposed by s. 38 of the Customs and Inland Revenue Act, 1881, as amended and extended by s. 11 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), on the value of personal or moveable property to be included in accounts thereby directed to be delivered."

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"to or in trust for any persons by way of succession" within the definition of "settlement" given by s. 22. (1) The accident of Mrs. Popham having exercised her power of appointment by will rendered probate duty payable in respect of the disposition of her particular interest in the trust fund, which was not an absolute interest, but was subject to her husband's life interest; but it is on the passing of the settled property itself, and not on the passing of a particular interest in it, that the liability to estate duty arises. Here the point of time at which the settled property passed and the liability arose was when the cesser of the husband's life interest took place after the commencement of the Act. "Interest" is not substituted for "property" in s. 2, sub-s. 1 (*b*), of the Act of 1894. That section only fixes the event upon the happening of which the property shall be deemed to pass. Sub-s. 1 (*c*) shews that the liability to estate duty arises on the passing of property and not of interest, because it provides that property passing on the death shall be deemed to include property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), and it is clear that an account, under those sections, is an account of the property itself. Again, s. 7 deals with the method of valuing an estate for the purpose of estate duty, and sub-s. 7 provides that "the value of the benefit accruing or arising from the cesser of an interest ceasing

(1) Sect. 22, sub-s. 1: "(*h*) The expression 'settled property' means property comprised in a settlement.

"(*i*) The expression 'settlement' means any instrument, whether relating to real property or personal property, which is a settlement within s. 2 of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust."

The Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 1: "Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates, or is for the purposes of this Act a settlement."

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on the death of the deceased shall, if the interest extended to the whole income of the property, be the principal value of that property; and, if the interest extended to less than the whole income . . . . be the principal value of an addition to the property equal to the income to which the interest extended," shewing that it is the principal value of the property which, on the cesser of the life interest, becomes taxable. The duties, superseded by estate duty, which are mentioned in paragraphs 1 and 2 of the 1st schedule of the Act of 1894 are probate duty, properly so called, and account duty, the latter being a duty payable in respect of property disposed of by the instruments dealt with by s. 38 of the Customs and Inland Revenue Act, 1881, and the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11. The nature and effect of those instruments is pointed out in the judgment of the Court in *Attorney-General* v. *Gosling*. (1) They may be described as instruments whereby some voluntary disposition, of what may be termed a "quasi testamentary" character, is made within twelve months of the death of the deceased for the purpose of evading probate duty. Sect. 5, sub-s. 2, of the Finance Act, 1894, provides that "if estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not . . . . be payable in respect thereof until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property." That section was passed to prevent the hardship which would arise if, where property was settled by the will of a person dying after the commencement of the Act and on his death estate duty was paid upon the whole principal value of the property, estate duty had to be paid again whilst the property was devolving under the limitations of the settlement. The only intention of s. 21, sub-s. 1, was to prevent a similar hardship arising where probate or account duty had been already paid on the whole of the settled property on the death of a person dying before the commencement of the Act who had settled it either by will or by quasi testamentary disposition. In the one case estate duty

(1) [1892] 1 Q. B. 545.

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is not to be paid again; in the other, estate duty in lieu of probate or account duty is not to be paid until the property has come into the hands of some person competent to dispose of it. The words in s. 21, sub-s. 1, "settled by a disposition made by a person dying before the commencement of this part of this Act" must refer to those quasi testamentary dispositions made within twelve months before the death of the deceased, which were aimed at by s. 38 of the Customs and Inland Revenue Act, 1881. The words "dying before the commencement of this part of this Act" would otherwise be meaningless. Sect. 21, sub-s. 1, of the Act of 1894, therefore, does not apply to this case, because the settlement was not made by will, and the disposition by which it was made was not one of the quasi testamentary dispositions aimed at by s. 38 of the Act of 1881. The duties mentioned in paragraphs 1 and 2 of the 1st schedule of the Finance Act, 1894, were payable in respect of the whole settled property, and the words in s. 21, sub-s. 1, "in respect of which property," shew that the duty must have been paid in respect of the whole settled property in order to render the exemption from estate duty applicable. In the present case probate duty has not been paid in respect of the whole settled property, because 936*l.* was deducted as the value of Mr. Popham's life interest.

Further, it is submitted that the Crown is, at any rate, entitled to claim estate duty in respect of the 936*l.* on which no duty has been paid.

Haldane, *Q.C.*, and *Danckwerts*, for the defendant. Sect. 21, sub-s. 1, of the Finance Act, 1894, applies to exempt this property from estate duty. This case comes within the very terms of that sub-section, which ought not to be limited in its effect in the way suggested for the Crown. The property is settled by the combined effect of the marriage settlement and Mrs. Popham's will. The settlement and will must be read together as constituting the settlement, the appointment by the will being the only thing effective at law to pass the property. In *Attorney-General* v. *Chapman* (1) the question arose whether the exercise of a power of appointment under a marriage settle-

(1) [1891] 2 Q. B. 526.

ment caused the settled personal property to "pass under the settlement" within s. 38 of the Customs and Inland Revenue Act, 1881. The Court held that it did, and that the settlement and deed of appointment together constituted a voluntary settlement whereby a life interest was reserved to the appointee. So here, Mrs. Popham's will, whereby she exercised her power of appointment under the settlement, taken together with the settlement, constituted a settlement of personal property within the meaning of s. 21, sub-s. 1, of the Act of 1894. The definition of "settlement" in s. 2, sub-s. 1, of the Settled Land Act, 1882, includes "any number of instruments" under or by virtue of which any land or estate or interest in law stands for the time being limited to or in trust for any persons by way of succession. This case, therefore, is brought within that definition, as applied to settlements of personal property by s. 22, sub-s. 1, of the Act of 1894. The word "disposition" in s. 21, sub-s. 1, is wide enough to include a will, and if the personal property in this case was not settled by Mrs. Popham's will, it was, at any rate, settled by a "disposition" effected by the settlement and will together. "Disposition" is not a technical term; it means merely an instrument which disposes, or more instruments than one which dispose, of property. Probate duty having been paid in respect of the property appointed by the will, the terms of s. 21, sub-s. 1, are satisfied and the exemption from estate duty applies. It applies to exempt the whole of the property, including the 936*l.* which was deducted as the value of Mr. Popham's life interest. No duty of any kind would be payable under the old law in respect of that portion of the personal property. The Legislature, it is submitted, intended to provide a total exemption from estate duty where, on the death of a person dying before the commencement of the Act, all the duties then payable at law had been paid. Here upon Mrs. Popham's death probate duty at the rate of 3 per cent. and legacy duty at 1 per cent. were paid in respect of the property she appointed. If the claim of the Crown be well founded, a further duty—estate duty at about 3 per cent.—is now payable; so that 7 per cent. in all will have been paid; whilst, if Mrs. Popham had died after the commencement of the Act, estate duty only at about

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3 per cent. would have been payable. The construction which, on behalf of the Crown, it is sought to put upon s. 21, sub-s. 1, must read into the section words which are not there. After the words "has been paid or is payable," the words "in respect of the original settlement of the property" must be read in. The operation of the section cannot be limited in that way. Its terms are perfectly general; it is intended to be the complement of s. 5, sub-s. 2, and to guard against the hardship of putting a first tenant for life, who died before the commencement of the Act, into a worse position than if he died afterwards, by enacting that if the duties specified in paragraphs 1 and 2 of the 1st schedule have been paid, or are payable, in respect of his property, then that property is to be cleared of estate duty in exactly the same way as if estate duty had been payable in the event of the first tenant for life dying after the commencement of the Act. Reading s. 2, sub-s. 1 (*b*), and s. 7, sub-s. 7, together, it is clear that in this case it is only to the extent to which a benefit has arisen by the cesser of Mr. Popham's life interest that the property is to be deemed to pass. The estate duty is not payable upon the property itself but in respect of an interest in it, and the words in s. 21, sub-s. 1, "in respect of which property" apply to that interest.

[They also referred to *Onslow* v. *Commissioners of Inland Revenue.* (1)]

Sir Richard Webster, A.-G., replied.

VAUGHAN WILLIAMS J. (after stating the facts as set forth ante):—It is contended for the Crown that, upon the death of Mr. Popham in August, 1894, the estate duty granted by s. 1 of the Finance Act, 1894, became payable upon the whole of the fund remaining subject to the trusts of the settlement. The defendant claims that the property is exempted from such duty by s. 21, sub-s. 1, inasmuch as Mrs. Popham by her will disposed of the trust funds in favour of certain beneficiaries, being in fact her husband and children; and on her death the sum of 2855*l.* was included, as the value of the reversionary interest so disposed of, in her executor's affidavit of the value of her estate

(1) [1891] 1 Q. B. 239.

and effects for the purpose of obtaining probate of her will under the Customs and Inland Revenue Act, 1881, and probate duty was paid on that sum as part of her personal estate and effects. It appears that in arriving at the value of this reversionary interest there was deducted the difference between the 2855*l.* and the total amount of the trust funds—the difference being a sum of about 936*l.* The question of the liability to pay the duty claimed by the Crown depends, in my judgment, entirely upon the true construction of s. 21, sub-s. 1, of the Finance Act, 1894, and its applicability to the facts of this case. [The learned judge read s. 21, sub-s. 1.] The contention for the Crown, as I understand it, is that no duty mentioned in paragraphs 1 and 2 of the 1st schedule has been paid "in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of the Act" within the meaning of that section. It is common ground that it could not be said, under the circumstances of this case, that duty has been paid in respect of personal property settled by a will; but the defendant contends that duty, being the probate duty referred to in the first paragraph of the first schedule, has been paid in respect of personal property settled by a "disposition" within the meaning of that word in s. 21, sub-s. 1. Whether that be so or not depends upon what was the nature of the act of Mrs. Popham by which she made the disposition in favour of the beneficiaries. If that disposition was not part and parcel of a settlement by a will or a disposition, then the case would not come within s. 21, sub-s. 1. It is said on behalf of the Crown that the disposition by Mrs. Popham was independent of the settlement—that it ought to be looked at as a mere disposition by Mrs. Popham of property, the disposition of which was left in her notwithstanding the settlement, and as having really no dependence whatsoever upon it. This view is contested by counsel for the defendant. They say that the disposition must be treated as the exercise of a power of appointment created by the settlement; and, if so, that the subject of the disposition is properly settled by the settlement, and the disposition of Mrs. Popham is a disposition within the meaning of s. 21. I agree with the

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contention put forward for the defendant. In my view the exercise of the power of appointment ought to be referred to the instrument which has created it. I understand that view to have been taken in *Attorney-General* v. *Chapman* (1), decided under s. 38 of the Customs and Inland Revenue Act, 1881. By that enactment stamp duties were imposed in respect of accounts delivered of personal property, including any property "passing under any past or future voluntary settlement" made by any person dying on or after June 1, 1881, by deed or any other instrument not taking effect as a will whereby the interest in such property for life is reserved to the settlor. In that case the particular instrument of appointment was an instrument which did not create any life interest in property; the only life interest was created by the settlement itself which gave the power of appointment. The question to be decided was whether the case was brought within the provisions of the statute. Wills J., in delivering the judgment of the Court, said (2): "But in order that the duty may be payable it is necessary that the settlement should be one by which a life estate shall have been reserved to the settlor, and, therefore, since the deed of appointment reserved nothing to the appointor, the duty is not payable unless within the meaning of the sub-section the property in question 'passed under' the deed of 1843. The expression 'passed under' is not a phrase of art in the same strict sense in which 'devise,' 'grant' 'estate in fee,' 'remainder,' and a host of others having exact and uniform technical significations would be properly so termed. It is a phrase of a comprehensive nature, and we think it may fairly be used in respect not only of dispositions which are effected by the words of the instrument creating them but of those which are effected by the subsequent execution of a power created by the instrument in question. A deed of appointment would do nothing of itself, and only owes its vitality to the instrument creating it. It is surely, under such circumstances, no stretch of language to say that property, the right to direct the application of which is created by deed A, but the specific direction of which is effected by deed B, passes *under*

(1) [1891] 2 Q. B. 526. (2) [1891] 2 Q. B. at pp. 531, 532.

(not *by*) deed A." It is true that in the enactment we now have to consider the word used is "on" and not "under," but I am not pressed with that difference, because Wills J. was not laying down any new proposition of law, but was merely enunciating a well established proposition of law—that when a deed of appointment is executed under the powers of some antecedent settlement by will or deed, the deed of appointment must be referred to the will or deed of settlement containing the power of appointment. That proposition was laid down in *Lord Braybrooke* v. *Attorney-General*. (1) In that case the words used were not "by" or "under," but "referred to." So here, I think that the execution of this power of appointment must be treated as part and parcel of the settlement, and, therefore, I think that the argument for the Crown—that the property dealt with by Mrs. Popham by her will was not property settled by will or disposition—fails. It is true that it was not settled by will, but it was settled by disposition, and it was not the less settled by disposition because the appointment took the shape of a will. But then it is said that no probate duty was payable in respect of the settlement as such; that the duty only became payable by reason of the accident of the power of appointment being exercised in the form of a will. That may be perfectly true, but the Act of Parliament does not say that the duty must have been a probate duty paid in respect of the settlement as such; it only says that the duty must be a probate duty payable in respect of personal property settled by a will or disposition. It seems to me that the case does not the less come within the words of s. 21, sub-s. 1, because, at the time of the origin of the settlement, and independently of the accident of the will, no probate duty was payable at all. I am, therefore, of opinion that this case does come within the very words of s. 21, sub-s. 1. Before leaving this subject I wish to call attention to what seems to me the general scope and intention of the provisions of the statute. I do not say that the construction contended for on behalf of the Crown is an impossible one; and it therefore seems necessary to see which of the two constructions conforms better to the general

(1) (1860) 9 H. L. C. 150.

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scope and intention of the Act. Sect. 1 creates estate duty. It is a duty admittedly payable on property as such, not on estates or interests in property, and it is payable on property which passes on the death of every person dying after the commencement of Part I. of the Act. Sect. 1 goes on to provide that the existing duties mentioned in the 1st schedule shall not be levied in respect of property chargeable with estate duty. The duties specified in the schedule are probate duty, and what may be termed "quasi probate duty," namely, duty payable in respect of dispositions not strictly testamentary, but dispositions which the Legislature thought proper to include within the scope of the duty as being dispositions which might have a tendency to evade, and be executed for the purpose of evading, probate duty. The expression "property which passes" is somewhat indefinite; but it seems to be agreed here that it means the passing of the property itself, and that the mere change in the interest or estate accruing upon a death is not necessarily within the words "property which passes on the death." The case of a change in the interest or estate is dealt with by s. 2, sub-s. 1, which provides that property passing on the death of the deceased shall be deemed to include (*a*) "property of which the deceased was at the time of his death competent to dispose," and (*b*) "property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." I do not think it is very material to refer to clauses (*c*) and (*d*), though clause (*c*) was relied on as shewing that the enactment in s. 2 had not altered from "property" to "interest" the subject-matter on the passing of which the duty is to become payable. I think that there are other provisions which tell against that construction, although it may be that the provisions of clause (*c*) tell in its favour. In substance, however, and for all practical purposes, it seems to me that the effect of s. 2 (*b*) is to include in the subject-matter on the passing of which duty is to be payable not only property strictly so described, but interests or estates in property. The only other sections to which I need refer are ss. 5 and 7. It seems to me that the framers of this Act felt that possibly the

imposition of the new duty might work hardship in some cases, and those cases are divided generally in the Act into two categories—first, cases in which the hardship might arise by the imposition of the new duty taken by itself; and, secondly, cases in which it might arise in respect of persons who had paid duties under the existing law, that is to say, duties which are mentioned in paragraphs 1 and 2 of the 1st schedule. Cases under the first category are dealt with by s. 5, which, by sub-s. 1, creates the "settlement estate duty," and provides (*b*) that "during the continuance of the settlement the settlement estate duty shall not be payable more than once." Sub-s. 2 also provides against estate duty being payable again, where it has been already paid since the date of the settlement, until the death of a person who was at the time of his decease or had been during the continuance of the settlement competent to dispose of the property. Those provisions against the double payment of duty recognise, I think, the distinction I have already drawn between the payment of the duty on property strictly so called and payment of the duty on interests arising under a settlement which has carved out a succession of interests from one property. Again, s. 7, sub-s. 7, recognises the same distinction. Then s. 21, sub-s. 1, deals with the similar hardship which might arise where the interests carved out of a property have been created by a person dying prior to the commencement of the Act, and existing duties have been paid in respect of the property out of which such interests have been carved. I think we ought, if possible, to give to that section such an interpretation as will make it effective to guard against the hardships which, having regard to the whole scope of the Act and to its particular provisions against hardship, it is plain the Legislature intended should be guarded against. I am of opinion that the Legislature did not intend that double duty should be paid in respect of property settled in this way, and that s. 21, sub-s. 1, was passed with the object of preventing that hardship. I think that it will not be prevented if we put upon the section the construction contended for on behalf of the Crown, but that it will be prevented if we put the construction contended for by the defendant.

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The only remaining question is whether any duty at all is payable by the defendant. It follows from what I have already said that the first prayer of the Crown cannot be supported; the defendant is not liable to pay duty upon the whole principal value of the trust funds remaining subject to the indenture of October 16, 1871. But here no probate duty was paid in respect of the sum of 936*l.* deducted from the capital value of the trust funds. Under those circumstances I think that the defendant cannot, in respect of that part of the personal property, or that interest in the personal property, rightly say that any duty whatsoever has been paid. Therefore, in my opinion, the Crown is only entitled to judgment in respect of that portion of the property as to which it cannot truly be said that any duty included in the duties mentioned in the 1st schedule has been paid.

WRIGHT J. I agree. It is conceded that but for s. 21, sub-s. 1, of the Act of 1894, the defendant would be liable to estate duty under s. 1. The rights of the parties appear to me to depend on the true construction of one phrase in s. 21, sub-s. 1—namely, "personal property settled by a will or disposition made by a person dying before the commencement of this part of the Act," the person so dying being in this case Mrs. Popham. The definition of "settlement" in s. 2 of the Settled Land Act, 1882, is not easy to understand. Reading the material words, and substituting "property" for "land," it is "any will or instrument under or by virtue of which instrument any property stands for the time being limited to any persons by way of succession." The question here, therefore, is whether Mrs. Popham's will (whether it be called a will or a disposition is immaterial) can be considered an instrument under or by virtue of which the property was limited to any persons by way of succession. If it stood alone, I should say that it certainly could not be so considered. It simply appoints the property to her children, subject to her husband's life interest. But it must be considered with regard to the settlement, and should, I think, be treated in this way: it is a pure testamentary appointment; it does not purport to do anything but exercise the power given

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by the marriage settlement. That being so, it seems to me that, the marriage settlement not having designated as the persons to take the property the persons who do take under the appointment contained in the will, it is the will which makes the marriage settlement operative as giving an estate to the particular persons who take. It cannot, therefore, be said that Mrs. Popham's will was an instrument under or by virtue of which the property became limited, by way of succession to her own estate, to the particular persons who took it. The succession to her own estate is not under the will but under the marriage settlement, though effect is given to the succession by the will.

On the other point, I am unable to find anything in s. 21 of the Act of 1894 which entitles the Crown to say that unless the whole estate has been taxed for probate duty, even though probate duty was not payable in respect of the whole of it, the defendant ought to pay duty again, and to pay it on the whole estate; nor can I quite understand the case for the defendant—that he is not liable, pro tanto, for that which he has not paid. Sect. 21 seems to me to exempt him only so far as he has paid.

Judgment for the Crown for part of the duty claimed.

Solicitor for Crown: *The Solicitor of Inland Revenue.*
Solicitors for defendant: *Flower, Nussey & Fellowes.*

W. A.

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April 7, 8.

THE ATTORNEY-GENERAL *v.* THE NEW YORK BREWERIES COMPANY, LIMITED.

*Revenue—Probate Duty—Executor de son Tort—Intermeddling with Estate—Penalties—*55 *Geo.* 3, *c.* 184, *s.* 37—*Customs and Inland Revenue Act*, 1881 (44 *&* 45 *Vict. c.* 12), *s.* 40.

Sect. 37 of 55 Geo. 3, c. 184, provides that if any person "shall take possession of and in any manner administer" any part of the personal estate of a deceased person without obtaining probate or letters of administration within six months after the death, he shall be liable to penalties.

On the death of a testator, resident and domiciled in America, shares and debentures in an English company, of which he was the registered holder in the books of the company in London, passed by his will according to the law of his domicil to his executors in America. At their request the company registered them as the holders of two shares and a debenture in the place of the deceased. The executors, to the knowledge of the company, had not obtained, and did not intend to obtain, probate of the will in England:—

Held, that the company had not "taken possession of and administered" any part of the deceased's personal estate within the meaning of s. 37, nor had it intermeddled with that estate so as to become an executor de son tort and liable to pay the equivalent of probate duty.

Information by the Attorney-General on behalf of the Crown, claiming against the defendant company such duties as would have been payable in respect of certain personal estate of one Henry Clausen, deceased, if probate of his will or letters of administration of his estate and effects had been duly obtained in England in respect of such personal estate, or otherwise that the defendant company might be ordered to pay penalties under 55 Geo. 3, c. 184, s. 37, and the Customs and Inland Revenue Act, 1881. (1)

(1) 55 Geo. 3, c. 184, s. 37: "If any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased within six calendar months after his or her decease. . . . every person so offending shall forfeit the sum of 100*l.*, and also a further sum at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the

The following material facts appeared from the information and the defendants' answer thereto :—

The defendants are an English company incorporated, in August, 1888, under the Companies Acts, 1862 to 1886. The capital of the company (including loan capital) is 930,000*l.*, divided into preference shares, ordinary shares, and mortgage debentures. The registered office of the company is in the city of London. The objects for which the company was established, as stated in the memorandum of association, are (inter alia) (*a*) to carry on business as brewers, maltsters, &c. ; (*b*) to acquire all or any part of the property, rights, powers, and privileges of two specified brewing businesses in New York, then carried on by two American companies. By the articles of association of the company it was provided (art. 9) that the shares should be at the disposal of the directors, and (art. 11) that no person should be recognised by the company as holding any share upon any trust, and the company should not be bound by or recognise any equitable, contingent, future, or partial interest in any share, or (except as thereby expressly provided) any other right in respect of any share except an absolute right to the entirety thereof in the registered holder. Art. 49 provided that a book, to be called the register of transfers, should be kept by the secretary under control of the directors.

Art. 43 : "In the case of the death of a shareholder the survivor or survivors where the deceased was a joint holder, and the executors or administrators of the deceased where he was a sole holder, shall be the only persons recognised by the company as having any title to his shares." By art. 44, any person becoming entitled to a share in consequence of the death

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probate of the will or letters of administration of the estate and effects of the deceased."

The Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 40 : "If any person who ought to obtain probate or letters of administration or deliver a further affidavit or to exhibit an inventory or who is required to deliver such account as aforesaid shall neglect to do so within the period prescribed by law for the purpose, he shall be liable to pay to Her Majesty double the amount of duty chargeable, and the same shall be a debt due from him to the Crown, and be recoverable by any of the ways or means now in force for the recovery of probate, legacy, or succession duties."

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or bankruptcy of a member may, on producing such evidence of title as the directors shall require, either be registered himself as holder of the share, or have some person nominated by him registered as transferee thereof.

Art. 47: "A person entitled to a share by transmission shall be entitled to receive and may give a discharge for any dividends, bonuses, or other moneys payable in respect of the share."

The articles of association also gave the directors of the company power to borrow sums of money not exceeding 330,000*l.*, and to secure the repayment by the issue of debentures or debenture stock charged on all or any part of the company's property. This power was exercised shortly after the incorporation of the company, and by deed the company and its trustees granted its property to trustees to hold for the benefit of debenture-holders, subject to the conditions therein expressed. The deed provided (inter alia): "The company, its successors or assigns, shall at all times hereafter keep an office or agency in the city of London, and a book or books therein which shall serve as a register of the said debentures, in which shall be entered the name and address of the holder of any of the said debentures, and the number of every of the said debentures held by him." The deed gave a form of the debentures to be issued by the company. By the debenture the company agreed to pay the principal sum secured thereby (and the interest thereon) to the registered holder of the debenture for the time being in accordance with the conditions indorsed. The debenture charged with the payment of the sum secured and interest "the whole of the company's real and personal property present and future in the United Kingdom, and such other property (if any) as can lawfully be charged in accordance with the laws applicable thereto." The conditions indorsed on the debenture provided (inter alia) that the principal moneys and interest secured by the debenture would be paid at the registered office of the company, or at some bank in London or Westminster to be from time to time appointed by the company and notified to the registered shareholders.

There is not, and never has been, any register of shares or

register of debentures of the defendant company elsewhere than in London.

Under an agreement made in August, 1888, the defendant company acquired the lands, buildings, plant, furniture, and goodwill and stock-in-trade of the two brewing businesses carried on by the American companies in the State of New York, all of which property was vested in trustees for the defendant company, and the defendant company thereupon carried on, and continued to carry on, the business of brewing, under their memorandum and articles of association, in America, where a number of the debenture-holders and shareholders reside and receive their dividends and interest.

Henry Clausen, a citizen and resident of the State of New York, and domiciled there, died in December, 1893, having by his will, which was duly made according to the law of his domicil, appointed H. W. Schmidt and P. V. Stocky, both of New York, his executors. In January, 1894, letters testamentary of Henry Clausen's estate were duly granted by the Surrogate's Court of the city and county of New York to the executors, who were and are entitled to all the personal estate and effects, wheresoever situate, of the testator. Henry Clausen's will had not been proved in England, and no administration or representation to his estate in any form had been granted or taken out in England.

At the date of his death Henry Clausen was the registered holder in the books of the defendant company in London of preference and ordinary shares and debentures of the company of a value exceeding 10,000*l*.

At the request of Henry Clausen's executors the defendant company transferred, in the books of the company in London, one of such preference shares, one of such ordinary shares, and one of such debentures into the names of the executors. The defendant company also, at the like request, paid to the executors dividends on shares which had become due after Henry Clausen's death, and interest on debentures which had become due before his death. The defendant company, at the times when they so transferred the shares and debenture and paid the dividends and interest, knew that the executors did not

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intend to obtain probate of his will in this country. The information alleged that by so acting the defendant company had in fact taken possession of and administered the shares, debentures, interest and dividends so transferred, paid, and dealt with, and had become an executor de son tort thereof, and liable to the penalties and duties imposed by 55 Geo. 3, c. 184, s. 37, and by the Customs and Inland Revenue Act, 1881, s. 12; and, further, that the defendant company had become and was liable and ought to account to the Commissioners of Inland Revenue for the value of the personal estate of Henry Clausen in this country, and to pay such duty as would have been payable if probate or administration to Henry Clausen in this country had been duly obtained. The information prayed (inter alia) that it might be declared that the defendant company had become and was liable to deliver to the Commissioners of Inland Revenue an account of the shares and debentures which were registered in Henry Clausen's name at his death, and of the dividends and interest thereon, being respectively his personal estate, and of the value of such estate, and to pay such duty (including estate duty under s. 5 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7)) as would have been payable if probate or administration had been duly obtained in England in respect of his personal estate; and, further, that the defendant company had become and was liable to the penalties imposed by s. 37 of 55 Geo. 3, c. 184, and s. 40 of the Customs and Inland Revenue Act, 1881, by administering Henry Clausen's personal estate without obtaining probate or letters of administration.

Sir Richard Webster, *A.-G.*, and *Vaughan Hawkins*, for the Crown. The defendant company is an English company within the decision in *San Paulo (Brazilian) Ry. Co.* v. *Carter* (1), and the shares and debenture transferred to Clausen's executors were bona notabilia in London, and, therefore, taxable in this country. The location of shares and debentures is where the register is: *Attorney-General* v. *Higgins*. (2) By transferring the shares and debenture into the names of the executors, and

(1) [1896] A. C. 31. (2) (1857) 2 H. & N. 339.

by paying to them dividends and interest on the shares and debentures, the defendant company intermeddled with the testator's property, so as to become an executor de son tort and subject to all the liabilities of an executor, including the liability to pay probate duty and the temporary estate duty of 1 per cent. imposed in respect of estates exceeding 10,000*l.* by s. 5 of the Customs and Inland Revenue Act, 1889. The acts of the company constituted a "taking possession of and administering" part of the personal estate of the deceased within s. 37 of 55 Geo. 3, c. 184, and they are liable to the penalties provided by that section. They also "neglected to obtain probate or letters of administration" within s. 40 of the Customs and Inland Revenue Act, 1881, and became liable to pay double duty under that section. The obligation to obtain probate in England is imposed by the Revenue Act, 1884, s. 11. (1) The company ought to have refused to register or pay the dividends and interest without the production by the executors of probate obtained in this country. They knew that probate had not been obtained in England, and that the executors did not intend to obtain it. The company, therefore, took upon itself to deal with the testator's property without requiring the executors to perfect their lawful title to it, and by so doing became an executor de son tort.

[They also referred to *Fernandes' Executor's Case* (2); *Sharland* v. *Mildon* (3); *Paull* v. *Simpson* (4); *Bodger* v. *Arch.* (5)]

Moulton, Q.C., and *Asquith, Q.C.* (*A. M. Bremner, Gore-Browne*, and *Roskill* with them), for the defendant company. The Crown is not entitled to any duty or penalties in this case. The registration of the executors as the owners of the shares and the debenture which formerly belonged to Clausen did not

(1) The Revenue Act, 1884 (47 & 48 Vict. c. 62), s. 11: "Notwithstanding any provision to the contrary contained in any local or private Act of Parliament, the production of a grant of representation from a court in the United Kingdom by probate or letters of administration or confirmation shall be necessary to establish the right to recover or receive any part of the personal estate and effects of any deceased person situated in the United Kingdom. . . ."

(2) (1870) 5 Ch. 314.

(3) (1846) 5 Hare, 469.

(4) (1846) 9 Q. B. 365.

(5) (1854) 10 Ex. 333.

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constitute a taking possession of or administering of those shares or that debenture. Registering a transfer is not taking possession of the shares or debenture; it is a mere recognition that the transfer has taken place, and a ministerial act consequent upon the transfer. The title to the shares of a testator passes to his executors by his will, not by probate. The defendant company could not have refused to register the transfer. If they had so refused, the fact that probate duty in this country had not been paid would have been no answer to proceedings brought to compel them to register. The property of the company being in America, they could have been sued there. If the company were compelled to pay the duty, they could not recover it from any one; nor would they be entitled to probate or letters of administration. The words "take possession of" in 55 Geo. 3, c. 184, s. 37, must be construed according to their ordinary meaning; they have no statutory meaning, and it is straining language to say that by registering a transfer of shares or debentures the company take possession of them. The payment of dividends on shares, which dividends became due after Clausen's death, cannot be an intermeddling with or taking possession of part of the testator's estate, because those dividends formed no part of the estate which passed by his will. The payment of interest, which became due before his death, on debentures was a payment to persons lawfully entitled to receive it and to give a good discharge. The executors are not bound to obtain probate until six months after the death, and they may receive payment of his debt from a creditor of the testator before obtaining probate: *In re Stevens, Cooke* v. *Stevens* (1), judgment of North J. (2) The words "take possession of and administer" refer to acts done in assertion of a right to the deceased's estate; they are such acts as an executor or administrator could have done, and it is only in respect of that class of acts that a person can become an executor or administrator de son tort: *Peters* v. *Leeder* (3), judgment of Lush J. (4) Sect. 40 of the Customs and Inland Revenue Act, 1881, does not apply, because the

(1) [1897] 1 Ch. 422.
(2) [1897] 1 Ch. at pp. 429, 430.
(3) (1878) 47 L. J. (Q.B.) 573.
(4) 47 L. J. (Q.B.) at p. 574.

company were not persons "who ought to obtain probate or letters of administration." Nor does s. 11 of the Revenue Act, 1884, which is only meant to apply where an executor or administrator has to prove his title in Court.

Sir Richard Webster, A.-G., replied.

WILLS J. I am of opinion that our judgment should be for the defendants. The claim of the Crown arises, in substance, under s. 37 of 55 Geo. 3, c. 184. [The learned judge read that section.] The question here is whether the defendants, in doing what they did, have "taken possession of and in any manner administered" part of the estate of the testator, Henry Clausen. It is unnecessary to concern ourselves with the words "in any manner administered," because if they took possession they certainly administered—they dealt with the property, and if they did not take possession neither did they administer. Two acts of the defendants material to consider are relied on as constituting a taking possession. The first act is the registration, in the books of the defendant company in London, of the names of Henry Clausen's executors in America as the holders of the shares and debenture, and the second is the handing over to the executors of the interest which had accrued upon the debentures at the time of the testator's death. It is obvious that any dealing with interest or dividends which accrued after his death could not have been a taking possession of part of his estate, because such interest or dividends never belonged to the testator, and could not have been included in any inventory of his property for the purpose of estate duty or probate duty. As to the first act of the company which is relied on, I am of opinion that the taking possession intended by the statute refers to some act which, if the person doing it had been an executor or administrator, he could have done in order to get possession of property which belonged to the deceased. What the defendants did in this case was, I think, no more than a recognition of the title of the executors and a transfer of the property into their names. In my view that was not a taking possession of the property: it was merely recognising the executor's title and acting ministerially, so to

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speak, in consequence of that recognition. Certainly, it was not an act which the executors could have done, and therefore, according to the view taken by Lush J. in *Peters* v. *Leeder* (1), the person doing it was not an executor de son tort; and, if that be so, it would not be a taking possession within the statute. Apart altogether from authority, however, the act does not seem to me to have been a taking possession of the deceased's property in any way. It seems to me an act analogous to what the defendants did in respect to the second matter relied on—namely, the handing over to the American executors the interest which had accrued upon debentures at the time of the testator's death. It is immaterial that that act of the defendants was done in respect of a small portion only of the deceased's estate. If intermeddling be established at all, an intermeddling with a part of the property is as good as an intermeddling with the whole, and it does not make the case of the Crown worse, nor that of the defendants better, that the intermeddling was with a very small part. Now, here the defendants simply paid to the executors, who were the persons entitled to receive it, money which belonged to them as executors, having belonged to the deceased, and having become their property upon his death by virtue of his will. It is very old law that an executor may act with respect to the deceased's property, and that people may deal with the executor as executor, before he has proved the will at all. This proposition cannot be more strongly illustrated than by the fact that an executor who has not obtained probate may sue, subject only to the condition that, if he has to prove his title when he comes into court, he must produce probate, because that is the only recognised means of proof. An executor's title, as has been laid down from the earliest times, does not depend upon the probate but upon the will; and, if the question here depended upon the old law only, it could hardly be seriously argued that the defendants, by paying a debt which they were bound to pay to the executors, had wrongfully intermeddled with the property for the purpose of administering it; although, if the defendants chose to contest the executor's title and drove them to prove it in a court of law,

(1) 47 L. J. (Q.B.) 573, at p. 574.

the executors would be obliged to obtain probate before they could recover. Has any legislation had the effect of altering the old law? Sect. 11 of the Revenue Act, 1884, is relied on as having, to some extent, altered it. Sect. 11 provides that the production of a grant of probate or letters of administration "shall be necessary to establish the right to recover or receive any part of the personal estate and effects of any deceased person situated in the United Kingdom." If that enactment had been made before there was any definite recognition, deeply seated in the law, of the right of an executor to deal with the estate of the deceased before obtaining probate, it might fairly be said, perhaps, that the Legislature meant that the executor, before he obtained probate, should have no right to do anything with the deceased's property; but the enactment was made after the old law, as I have stated it, had existed for centuries, and I cannot think that by expressions of this kind, found in an Act passed to establish and facilitate the collection of duties, it was intended to make such a radical change in the law of England as is suggested—a change which would introduce intolerable inconvenience, and might work intolerable wrong by making it impossible to take the most necessary steps for the protection of property within a reasonable time, because it frequently happens that probate duty cannot be paid and probate obtained until complicated questions have been settled. In my view, s. 11 of the Revenue Act, 1884, means that where a person has to establish his right to recover or receive property in his capacity as executor, he must produce probate. That comes simply to an affirmation of the old law; or perhaps it goes a little further, because it gives a person who disputes the executor's right to recover or receive property the right to require the production of probate before the executor can say that his right is established. I do not think that s. 11 was ever meant to apply to cases where there was no occasion to establish the executor's right because nobody disputed it.

Unfortunately in this case the result is that these American executors escape paying English duty. I cannot help that. Sect. 37 of 55 Geo. 3, c. 184, does not make it an offence in other people to deal with an executor as an executor; it makes

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it an offence for an executor or other person to take possession of or administer any part of the deceased's personal property without first obtaining probate or letters of administration, and provides an appropriate penalty. Seeing that an executor has six months' grace before it is necessary for him to obtain probate, it is clear that all action of this kind on his part is not intended to be prohibited; it is prohibited only if he does not afterwards obtain probate, and possibly, also, if he does not intend to obtain probate. I am of opinion that the defendants have not really intermeddled with the administration of this estate. They have simply done that which the law entitles them to do—namely, to pay an executor without asking him to prove his title by the production of probate. I therefore think that the case for the Crown fails.

GRANTHAM J. I am of the same opinion. This case has been argued on behalf of the Crown as if the defendants were executors or had the power of executors. The defendants, however, were merely in the position of debtors to the testator, and under an obligation to the testator to do something which his executors could compel them to do. I can find no provision in any Act of Parliament prohibiting a person in the position of a debtor to the estate of a deceased person from paying his debt to the deceased's executors, or from paying it upon the executors' instructions. It may be that the Crown will lose the duty. I confess I do not see that the defendants are bound to pay the duty themselves; but it was conceded during the course of the argument that it was the universal practice of English companies, and was the practice of the defendant company, with regard to shares held by English testators, not to register a transfer to the testator's executors without production of probate. I think the defendants would be justified in refusing to register the transfer to these American executors unless they produced probate. I entirely concur in the judgment delivered by my brother Wills. The defendants are not persons administering, or who ought to administer, the estate in any way. They are not the persons who ought to obtain probate, and, under those circumstances, I cannot see how they can be made

liable to the penalties which the Crown seeks to enforce against them.

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Judgment for the defendants.

Solicitor for Crown: *The Solicitor of Inland Revenue.*
Solicitors for defendants: *Burn & Berridge.*

W. A.

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Nov. 25, 26; *Dec.* 21.

Ecclesiastical Law—Church—Pew in Chancel—Site of Ancient Pew—Right Appurtenant to House in Parish—Prescription—Evidence—Exclusive Possession—Acts of Ownership other than Repair—Lay Rector—Right to Chief Seat in Chancel.

The claimant of a right by prescription to a pew in the chancel of a parish church in respect of his ownership and occupancy of an ancient house in the parish must, as against the Ordinary, prove, not merely exclusive possession of the pew by himself and his predecessors, but also some act of user or assertion of proprietary right inconsistent with mere possession by permission of the churchwardens. The right to such a pew is subject to the burden of repair, but it is unnecessary to prove actual repair where evidence is given of other such acts of user or assertion of proprietary right, repair being only one of many possible acts of user. Upon such proof being given, a lost faculty should be presumed.

The removal of the woodwork of a pew in the chancel and the substitution of chairs for the former seats is an act of ownership or assertion of proprietary right inconsistent with any right in the Ordinary, and, together with exclusive possession, is sufficient to prove the claimant's right; such removal will not amount to an abandonment of the right, unless it be coupled with circumstances indicating an intention to abandon.

Re-lining a pew is not an act of repair.

Semble, per Charles J.: The right of the lay rector to the chief seat in the chancel of the parish church is not confined to a single seat for his personal occupation.

ACTION tried before Charles J. without a jury.

The defendants, the vicar and churchwardens of the parish of Sharnbrook, in the diocese of Ely, had applied to the Chancellor of the diocese for a faculty to erect new seats or stalls in the chancel of the parish church. The plaintiff, who alleged that he had a freehold interest in the sites on which it was proposed to erect the new stalls, after certain proceedings in

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the ecclesiastical court which are hereafter more fully stated, took out a summons for a prohibition, which was referred to the Divisional Court, who ordered that the parties should plead in prohibition. The parties having pleaded, the action now came on for trial. The substance of the pleadings was as follows:—

By the first paragraph of the statement of claim the plaintiff claimed that as lay rector of the parish and church of Sharnbrook, in the county of Bedford, the freehold of the chancel of the church was vested in him, and he was entitled to the chief seat in the chancel. It further stated that he was the owner and occupier of an ancient house in the parish, known as Sharnbrook House; that his ancestors were entitled by prescription in respect of their ownership and occupancy of the said ancient house to two ancient pews formerly standing, one on the north, the other on the south side of the chancel; that the pews had been pulled down some years ago by a member of his family and a former occupant of the house; and that the plaintiff was now entitled by prescription in respect of his ownership and occupancy of the said ancient house to a freehold interest in the sites of the pews—namely, an exclusive right in the nature of an easement to use the sites by himself, his family and servants, for attending divine worship, and for that purpose to have, erect, and use pews and seats thereon.

The second paragraph alleged that the plaintiff and his predecessors in title, owners and occupiers for the time being of the house, had always been in exclusive possession of the pews and sites for the aforesaid purpose, and had always as of right and as occasion required repaired, altered, and dealt with the pews, and the seats or chairs for the time being, replacing them at their own expense.

In the third paragraph the plaintiff, in the event of his being found to be not entitled to the sites by prescription, claimed a freehold right in them by reason of their having been from time immemorial occupied by the lay rector for the time being.

Paragraphs 4 to 9 set out the previous proceedings in the Consistory Court and the Divisional Court, and paragraph 10

alleged that the plaintiff had suffered damage by reason of the application of the defendants to the Consistory Court.

The plaintiff claimed that a writ of prohibition be directed to the Chancellor of the Diocese of Ely and to the defendants to prohibit them from further proceeding in the premises so as in any way to interfere with or affect his freehold right and interest.

The defendants admitted the plaintiff's claim as lay rector to the chief seat in the chancel. On the other branch of the claim they did not admit that Sharnbrook House was an ancient house; they admitted that the pews had been pulled down as alleged, but not that they were ancient pews; they denied that the plaintiff's ancestors were entitled to the pews by prescription, in respect of their ownership and occupancy of Sharnbrook House, and also that the plaintiff was now entitled in respect of his ownership and occupancy to the alleged freehold interest in the sites of the pews, or to any interest such as would oust the jurisdiction of the Ordinary to grant the faculty prayed for. They further denied that the plaintiff or his predecessors had ever been in exclusive possession of either of the pews or sites, or had ever repaired, altered, or dealt with either of the pews; they admitted that chairs had been placed on the sites of the pews, but denied that they had been so placed to replace the pews, or that they had been repaired, altered, or dealt with by the plaintiff or his predecessors. They further alleged that if the plaintiff's ancestors were ever entitled by prescription in respect of their ownership and occupation of Sharnbrook House to the pews, the right had been abandoned or lost, and that the Ordinary now had jurisdiction over the sites. As to paragraph 3 of the claim, they denied that the sites had been from time immemorial occupied by the lay rector for the time being, and said that, if there had been any occupation by him, it conferred no freehold right upon the plaintiff such as would oust the jurisdiction of the Ordinary. The allegations in paragraphs 4 to 9 were admitted.

The following statement of facts is taken from the written judgment of Charles J.:—

In this case the plaintiff claimed that a writ of prohibition

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be directed to the Chancellor of the Diocese of Ely and to the Rev. H. B. Wilkinson, vicar, and Lewis Jarvis and Arthur O. Clode, churchwardens, of the parish of Sharnbrook, in the diocese of Ely, to prohibit them from further proceeding in the matter of an application by the vicar and churchwardens to the Chancellor for (amongst other things) a faculty to erect new seats or stalls for the vicar and choir in the chancel of the said church. On September 20, 1895, the citation was issued, and by act on petition dated November 12 the now plaintiff in prohibition, Mr. Leonard Gibbard Stileman-Gibbard, alleged a freehold interest in the sites proposed to be occupied by the new seats or stalls. Notwithstanding the act on petition, the Chancellor ordered the case to proceed, and fixed February 6, 1896, for hearing. Thereupon, on January 30, 1896, a summons for a prohibition was taken out, the hearing of which was remitted from chambers to the Divisional Court. Upon the hearing there, the parties were ordered to plead in prohibition; and the question raised by the pleadings, which I have now to determine, is whether Mr. Gibbard, the plaintiff in prohibition, has made out a title against the Ordinary to the sites in question as owner and occupier of an ancient house in the parish called Sharnbrook House, or as lay rector of the parish. The facts, which were not seriously in dispute, are as follows:—

Sharnbrook House is an ancient house in the parish; it was built upwards of 200 years ago, and in 1792 was bought by a predecessor in title of the plaintiff. From the time of the purchase the successive owners resided there, and in 1800 the plaintiff's predecessor in title acquired, by the devise of a relative, the lay rectory. When the house was purchased, there were at the west end of the chancel of the church two large pews, approximately of the same size, one on the north and the other on the south side, which so far back as living memory extends until 1871, when they were removed in the manner hereinafter mentioned, were in the exclusive possession and occupation of the plaintiff and his predecessors. The pew on the south side was occupied by the owner of Sharnbrook House and his family; that on the north side by the servants.

In the other part of the chancel to the east of the north pew were seats in which persons sat who had obtained permission from the plaintiff or his predecessors.

In 1871 a relative of the plaintiff, then resident at Sharnbrook House—the plaintiff being at that time in his minority—caused the old pews to be removed. The woodwork was removed to Sharnbrook House and kept there, and on the site of the old pews chairs were placed on each side of the chancel, with matting on the floor. Mr. Stileman, the plaintiff's elder brother, stated that there were two rows of chairs on each side; and according to the evidence of the plaintiff himself they covered the whole length of the old pews, but not the entire breadth. There was at all events no doubt whatever that the whole of the ground covered by these chairs was within the sites of the old pews, and that the chairs were placed there in substitution for those pews. In 1877 the plaintiff came of age, and continued to attend the services of the church, occupying the chairs just referred to, with his household. In 1883 he himself ceased to attend, owing to some change in the mode of conducting the service of which he did not approve; but visitors at his house and the servants continued from time to time to occupy the chairs. In 1885 temporary wooden platforms were placed in the chancel for the choir, occupying wholly or in part the sites of the old pews. The plaintiff protested strongly against what he regarded as an infringement on his legal rights, in letters addressed to the churchwardens and to the bishop of the diocese in the months of May, June, and July in that year. Nothing however was done, and the choir continued to sit in the chancel. The matter remained in abeyance until 1893, the plaintiff not being during the interval in the habit of attending the church. In 1893 a relative, Miss Billington, came to Sharnbrook House, who desired to attend the church and to sit under a memorial window which was placed over the site of the old pew on the south side of the chancel, and the plaintiff then determined to take some steps to assert his title, partly on account of Miss Billington's wish, and partly because he had been informed that it was proposed by the vicar to substitute permanent stalls for the temporary

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platforms. A long correspondence, commencing in February, 1893, ensued between the plaintiff, the defendants, and the bishop, throughout the whole of which the plaintiff emphatically insisted upon his right to the pews or sites in question. It is unnecessary to refer to it in detail, and the only observation I need make upon the correspondence in 1885 and 1893 is this: that throughout the plaintiff based his claim to the pews on his right, as lay rector, to the chief seat in the chancel, and did not claim them as annexed by prescription to Sharnbrook House. Matters were brought to an issue in July by the removal by the plaintiff of the platform on the south side, and later he erected on that side a permanent oaken seat. There were other assertions of right on the one side and on the other, and ultimately the application was made to the Chancellor which it is now sought to prohibit him from hearing. The plan accompanying the application shews choir seats on the north side on the site of the old north pew; on the south there are also choir seats and a seat for the vicar on the site of the old south pew. Behind the bench for the choir on that side the plan shews another, called "lay rector's seat."

At the trial, although the exclusive occupation of both the old pews by residents at Sharnbrook House, so far as living memory extends, was proved to my satisfaction, the plaintiff failed to prove any actual repair of the woodwork or structure of the pews. My attention was drawn with reference to this point to two entries, one in 1842 and the other in 1850, in the book of a deceased person named Scrivener, who had been in the employment of the Gibbard family. Scrivener, I should remark, was a mason, but no doubt he may have done other than mason's work. The entry, however, of 1842 was illegible, and so far as it was material seemed to apply to cleaning the chancel and doing something to a pew in the church, where Mr. Gibbard certainly had a faculty pew in the nave; I can draw no inference of repair of the chancel pews from this entry. The other entry of 1850 records, "two days making good floor and setting monument to chancel": this again does not appear applicable to the pews. The plaintiff, however, did prove that somewhere about 1850 the pews were re-lined with baize secured by nails

driven into the wood. It was also proved that when, in the year 1858, a faculty was obtained for re-seating the body of the church, no reference was made to the chancel pews, although there is a recital in the faculty that the then existing seats in the church were insufficient for the accommodation of the parishioners. The faculty, it may be added, allotted to Mr. John Gibbard, who was a consenting party to the alterations, sittings in lieu of the faculty pew which he possessed at the east end of the nave.

Dibdin, for the plaintiff. The plaintiff has admittedly to shew title as against the Ordinary to the sites of these pews, though it would be unnecessary as against a stranger: *Ashly* v. *Freckleton* (1); *Kenrick* v. *Taylor* (2); *Crisp* v. *Martin* (3); *Pettman* v. *Bridger* (4); *Griffith* v. *Matthews* (5); and upon the evidence it is clear that he has discharged this obligation. Sharnbrook House, to which the pews are claimed as being appurtenant, is now practically admitted to be an ancient house, and the evidence clearly shews exclusive occupation of the pews by the plaintiff's predecessors in title during living memory. It is true that as a rule the claimant against the Ordinary of a prescriptive right to a pew must, in addition to occupation, prove repair of the pew by himself or his predecessors: *Kenrick* v. *Taylor* (2); *Proud* v. *Price* (6); but the rule is subject to this limitation, that repair need only be proved where it has been necessary within living memory: *Knapp* v. *Parishioners of Willesden* (7); *Crisp* v. *Martin* (3); and slight evidence of repair is sufficient, as in *Pepper* v. *Barnard* (8), where evidence of repair to one of three pews claimed was held sufficient to establish a right to them all. The principle underlying the decisions is that in addition to exclusive possession the claimant must as against the Ordinary shew acts of ownership over the pew, and repair is as a rule the act of ownership which can be most easily proved: in many cases it is the only act. In the present case there is no evidence that repair was necessary within

(1) (1683) 3 Lev. 73.
(2) (1752) 1 Wils. 326.
(3) (1876) 2 P. D. 15.
(4) (1811) 1 Phillim. 316.
(5) (1793) 5 T. R. 296.
(6) (1893) 62 L. J. (Q.B.) 490.
(7) (1851) 2 Rob. 358.
(8) (1843) 12 L. J. (Q.B.) 361.

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living memory, and it need not therefore be proved. If, however, evidence of repair is necessary, the acts of Scrivener and the re-lining of the pews in 1850 are sufficient. It is true that lining a pew has been held not to be an act of repair, but merely ornament: *Pettman* v. *Bridger* (1); but that case is distinguishable, for re-lining necessarily implies an act of repair. But repair is here not the only act of ownership proved; the removal of the woodwork of the old pews and the substitution of chairs was an act of ownership by the plaintiff's predecessor inconsistent with any right in the Ordinary to the pews themselves or to their sites. The plaintiff having proved repair and exclusive possession, a faculty should be presumed: *Halliday* v. *Phillips*. (2)

Secondly, the plaintiff as lay rector is entitled to the chief seat in the chancel: *Hall* v. *Ellis* (3); and this right is not confined to a seat for himself, but must include his family and household. [He also cited *Boothly* v. *Baily* (4); *Buxton* v. *Bateman* (5); *Morgan* v. *Curtis* (6); *Stocks* v. *Booth* (7); *Rogers* v. *Brooks* (8); *Clifford* v. *Wicks* (9); *Parker* v. *Leach* (10); *Walter* v. *Gunner* (11); Best on Presumptions, pp. 110–112.]

A. B. Kempe, for the defendants. The plaintiff is not entitled to a writ of prohibition; he can only oust the jurisdiction of the Ordinary by shewing that he has himself acquired a common law right to the pews or their sites: this he has failed to do. No faculty ought to be presumed in the present case. A faculty can only exist where the claim is to a pew as annexed to a house in the parish; and the general disposition of pews being in the Ordinary, and the liability to repair them being a liability of the parish, it must be shewn as against the Ordinary and his officers that the plaintiff and his predecessors have been subject to the burden of repairing the pews. If the plaintiff admits, as in law he is bound to admit, that his alleged right is subject to

(1) 1 Phillim. 316.
(2) (1889) 23 Q. B. D. 48; [1891] A. C. 228 (sub nom. *Philipps* v. *Halliday*).
(3) (1610) Noy, 133.
(4) (1615) Hob. 69.
(5) (1663, 1665) 1 Sid. 88, 201.
(6) (1828) 3 M. & R. 389.
(7) (1786) 1 T. R. 428.
(8) (1783) 1 T. R. 431, n.
(9) (1818) 1 B. & A. 498.
(10) (1866) L. R. 1 P. C. 312.
(11) (1798) 1 Hagg. Cons. 314.

the burden of repair, he must prove actual repairs, for there is no other act done by the plaintiff or his predecessors which can with propriety be called an act of ownership over the pews.

[Upon the point of the necessity of shewing repair, he cited the following authorities in addition to those cited on behalf of the plaintiff: *Jacob* v. *Dallow* (1); *Fuller* v. *Lane* (2); *Woollocombe* v. *Ouldridge* (3); *Churton* v. *Frewen*. (4)]

In the present case there is no evidence of repair; it is not clear that the work done in 1842 and 1850 by Scrivener was done to these pews at all. Again, re-lining the pews is not an act of repair of the pews, but merely an ornament; it is no better evidence of repair than originally lining the pews; and on this point the case is indistinguishable from *Pettman* v. *Bridger*. (5) The removal of the woodwork of a pew was clearly not an act of repair, nor was it an act of ownership; it is, on the contrary, evidence that at that time the plaintiff or his predecessors admitted no liability in themselves to repair or maintain the pews. The removal amounted to an abandonment of any right which the plaintiff or his predecessors may have previously possessed: *Moore* v. *Rawson*. (6) A claim to the sites of pews which have been removed cannot be sustained at law.

As lay rector the plaintiff has no special rights in the chancel, except to the chief seat: *Griffin* v. *Dighton* (7); and this right should be confined to a seat for himself, and not extended to seats for his family and household: *Spry* v. *Flood*. (8) [He cited *Mainwaring* v. *Giles* (9); *Hinde* v. *Chorlton* (10); *Brumfitt* v. *Roberts* (11); *May* v. *Gilbert* (12); 2 Roll. Abr. p. 288, tit. Prohibition (G.) 3, 4; Prideaux's Churchwarden's Guide, 16th ed. 294, 295.]

Dibdin, in reply.

Cur. adv. vult.

(1) (1698) 12 Mod. 233.
(2) (1825) 2 Add. 419.
(3) (1825) 3 Add. 1.
(4) (1866) L. R. 2 Eq. 634.
(5) 1 Phillim. 316.
(6) (1824) 3 B. & C. 332.
(7) (1864) 5 B. & S. 93; 33 L. J. (Q.B.) 181.
(8) (1840) 2 Curt. 353.
(9) (1822) 5 B. & A. 356.
(10) (1866) L. R. 2 C. P. 104.
(11) (1870) L. R. 5 C. P. 224.
(12) (1614) 2 Bulst. 150.

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Dec. 21. The following written judgment was delivered by

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CHARLES J. [After stating the facts as above, the learned judge proceeded: –] The plaintiff himself in his letters constantly asserted his claim in his capacity of lay rector, but in these proceedings and in the argument before me reliance was principally placed upon his right to the pews by prescription in respect of his occupancy of Sharnbrook House, and with this aspect of the case it will be convenient first to deal.

Now, although the possession of a pew raises a good title against a mere wrongdoer, it does not raise any presumption of right against the churchwardens, the officers of the Ordinary, who, with the incumbent, are defendants in prohibition in this case. Something beyond mere undisturbed possession must be proved against the Ordinary. The claimant, in order to establish his right against him to the pew or pews appurtenant to Sharnbrook House, must shew some acts of user, or assertion of proprietary right in addition to possession: *Halliday* v. *Phillips*. (1) If he can do so, then some rightful origin of the undisturbed enjoyment ought to be presumed against the Ordinary and his officers. In other words, a lost faculty ought to be presumed, whereby the occupiers of the particular messuage have had the pew or pews granted to them upon condition of their undertaking in relief of the parish the burden of repair. That this would be the form of the faculty was not disputed, and it was strenuously urged by the defendants that proof of actual repair was essential to justify me in presuming such a faculty, and that this was necessary, no matter what other acts of user or assertion of right were proved. To support this proposition a long line of authorities was quoted, beginning with *Boothly* v. *Baily* (2), and ending with *Proud* v. *Price*. (3) It is needless to allude in detail to them; but *Buxton* v. *Bateman* (4) may be referred to as an example where it was held on demurrer that in an action against the Ordinary or his officers repairs must be alleged and proved. In another case, again, it was said that, though reparation need not be alleged, it ought

(1) 23 Q. B. D. 48.
(2) Hob. 69.
(3) 62 L. J. (Q.B.) 490.
(4) 1 Sid. 88, 201.

to be proved (see Phillimore's Ecclesiastical Law, vol. ii. p. 1437); and there can be no doubt that the learned counsel for the defendants did not overstate the case when he alleged that proof of reparation has constantly been said to be necessary to exclude the Ordinary from the right which he would otherwise possess of regulating the seats in the church, and probably in the chancel also. But, in my opinion, the cases do not warrant me in holding that, where other acts are proved to have been done with regard to the pew inconsistent with mere possession by the permission of the churchwardens, a faculty is nevertheless not to be presumed merely because proof of actual reparation is wanting. Repair may not have been necessary, and in that case proof of repair was said by Dr. Lushington, in *Knapp* v. *Parishioners of Willesden* (1), not to be "absolutely necessary; simply because repair may not, within the memory of any one living, have been required." In *Pettman* v. *Bridger* (2), again, Sir John Nicholl says: "A prescriptive right must be clearly proved . . . . In the first place, it is necessary to shew that use and occupation of the seat has been from time immemorial appurtenant to a certain messuage . . . . Secondly, it must be shewn that if any acts have been done by the inhabitants of such messuage, they maintained and upheld the right. At all events, if any repairs have been required within memory, it must be proved that they have been made at the expense of the party setting up the prescriptive right. The onus and beneficium are supposed to go together—mere occupancy does not prove the right." The same judge, it was pointed out, stated in *Fuller* v. *Lane* (3), that a claimant to a pew appropriated to a house must shew "the annexation of the pew to the messuage time out of mind, and reparation." But I do not think this circumstance assists the defendant's argument. It rather points to the conclusion that the language used in that case, as in other cases, must be taken with some limitation, and that the limitation is that the claimant to a pew by prescription must prove against the Ordinary not only occupation but repair, if repair has been necessary, at his expense. This view is supported

(1) 2 Rob. 358, at p. 365. (2) 1 Phillim. 316.
(3) 2 Add. 419, at p. 427.

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by the judgment of Lord Penzance in *Crisp* v. *Martin*. (1) And in *Halliday* v. *Phillips* (2), already referred to, repair is treated as an act of user: see especially per Bowen L.J. (3) in the Court of Appeal, and Lord Herschell (4) in the House of Lords. This appears to me to be the true view of the law, and to shew that the question I have to consider is not merely whether actual repair has been proved, but whether any acts of user, including, of course, repair, which is, perhaps, the commonest of all acts of user, have been proved—acts which are only to be explained on the presumption of a right created by a faculty conferring upon the claimant a legal title.

I proceed to consider whether the plaintiff in this case has established any act of ownership beyond occupancy over these pews sufficient to exclude the Ordinary. He relied upon two: the first being the re-lining of the pews in 1850, which he submitted was an act of repair, and the second being the removal of the woodwork of the pews in 1871 to Sharnbrook House, and the substitution of chairs for the continuous seats. With regard to the re-lining of the pew, it has been said that that act cannot be called repair or regarded as an act of ownership, but that it is a mere question of ornament or comfort: see *Pettman* v. *Bridger* (5); *Morgan* v. *Curtis* (6); and this is undoubtedly true of ordinary lining and the putting in of cushions. It was alleged, however, that here something more was done than simply to line the pews, and that the nails driven into the woodwork constituted a substantial interference with the pews themselves. But I think this distinction too narrow, and that I ought not to hold what was done in 1850 to be an act of repair. But with regard to the removal of the woodwork of the pew in 1871, and the substitution of chairs for the former seats, I am of opinion that what was then done was an act of ownership amply sufficient, when taken in conjunction with the plaintiff's undisturbed possession during the period of legal memory, to prove the plaintiff's right. It was

(1) 2 P. D. 15.
(2) 23 Q. B. D. 48; [1891] A. C. 228.
(3) 23 Q. B. D. 48, at p. 54.
(4) [1891] A C. 228, at p. 230.
(5) 1 Phillim. 325, at p. 331.
(6) 3 M. & R. 389.

of an unequivocal character, and entirely inconsistent with any right existing in the Ordinary; and I hold, therefore, that I ought to presume the existence of a faculty to account for what would otherwise be—to use the words of Bowen L.J., in *Halliday* v. *Phillips* (1)—"a high-handed usurpation" of these pews.

I must add a few words, before disposing of this part of the case, on the question of abandonment. It was contended for the defendants, upon the authority of *Moore* v. *Rawson* (2) and similar cases, that by entirely removing the old pews in 1871 the plaintiff had abandoned his right; that he had in fact thereby so altered the condition of his tenement as to warrant me in drawing that inference against him. But it must be remembered that in every case of this kind the material inquiry must be whether there was any intention to abandon the right, and I am satisfied that in this case no such intention existed either in 1871 or subsequently. The plaintiff did in that year, it is true, alter his mode of enjoyment of the right to sit in that part of the chancel formerly occupied by the pews, using chairs fastened together in place of the old seats. But he did not discontinue his enjoyment. He used the chairs for himself and his household until 1883, when he ceased himself to attend the church, and, in the correspondence which began in 1885 with the churchwardens, the incumbent, and the Ordinary, he indicated throughout a firm determination to maintain his rights. His non-interference with the choir between 1885 and 1893, which was also relied on, was not in my opinion anything more than a mere temporary intermittence of the user, and, being unaccompanied by any intention to renounce the right, does not amount to an abandonment.

Having arrived at a conclusion in favour of the plaintiff in respect of his ownership and occupancy of Sharnbrook House, it is not necessary for me to decide on his alternative claim as lay rector; but having regard to the arguments addressed to me upon that point, I think I ought shortly to express my view as to the lay rector's rights in respect of chancel seats. Now, it has been stated in numerous cases that by the common law

(1) 23 Q. B. D. 48, at p. 56. (2) 3 B. & C. 332.

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of the land or of common right the rector is entitled to the "chief seat" in the chancel: see, for example, *Spry* v. *Flood* (1); *Clifford* v. *Wicks*. (2) But the extent of this right is not easy to define; and it was suggested by the counsel for the defendants that, having regard to the origin of such a right, which must have existed before the Reformation, it is a right merely to a seat for the rector himself. This, however, according to the authorities, is too restrictive a definition. "The general rule is," says Bayley J. in *Clifford* v. *Wicks* (2), "that the rector is entitled to the principal pew in the chancel; but that the Ordinary may grant permission to other persons to have pews there." And Dr. Prideaux writes thus of the parson's right (Prideaux's Churchwarden's Guide, 16th ed. p. 292): "As a lord of a manor, or any other owner of an ancient messuage, may prescribe to a seat in the body of the church, which he and his ancestors have immemorially used and repaired, to the exclusion of the bishop, so may the parson prescribe to a seat in the chancel, which he and his predecessors have immemorially been possessed of. And if not so, yet since the charge of repairing that part of the church, as well as the freehold, is in the parson, it is most reasonable that he should be first provided for with a seat for his family in it. And the case is the same, whether the parson be appropriator, impropriator, or instituted rector of the parish."

The right to the chief seat then appears to be something more than a right to one sitting only. The size and situation of the seat must in each case, I presume, be determined by user, and it may be prescribed for against the bishop where the parson can prove immemorial possession. Repair in such case, I apprehend, certainly need not be proved, for the burthen of repair would by the general law fall upon the parson, whose claims to the seat must in the first instance have been based on his duty of repairing the chancel: *Hall* v. *Ellis*. (3)

I may add that the practice in Sharnbrook Church as regards seats in the chancel generally accords with the statement of the law on the subject by Dr. Prideaux (Prideaux's Church-

(1) 2 Curt. 353. (2) 1 B. & A. 498.

(3) Noy, 133.

warden's Guide, 16th ed. p. 295): "If the bishop doth not interpose," he says, "then the parson may dispose of the seats in the chancel in the same manner as the churchwardens do those in the body of the church, because of his repairing of it; but if there doth any controversy arise, then there doth lie an appeal to the bishop from the one as well as from the other." The plaintiff and his predecessors have always so regulated the disposition of the seats, and their right to do so appears to have been admitted in 1858, when the faculty granted did not in any way deal with the chancel seats.

In the result my judgment must be, for the reasons given, for the plaintiff, as the owner and occupier of Shambrook House, for a writ of prohibition to be directed to the Chancellor of the Diocese of Ely and to the defendants to prohibit them from further proceeding so as in any way to interfere with or affect the freehold right and interest of the plaintiff in respect of the sites of the two ancient pews mentioned in the statement of claim. The plaintiff is entitled to the costs of these proceedings, including those incurred at chambers and in the Divisional Court.

Judgment for the plaintiff.

Solicitors for plaintiff: *Taylor, Stileman & Underwood.*
Solicitors for defendants: *Lee, Bolton & Lee.*

W. J. B.

1897
May 7.

THE QUEEN *v.* THE GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION OF THE UNITED KINGDOM.

Medical Practitioner—Dentist—Right to be Registered—Qualification—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *ss.* 6 (*c*), 7, 37.

By s. 6 (*c*) of the Dentists Act, passed July 22, 1878, any person at the passing of the Act bonâ fide engaged in the practice of dentistry is entitled to be registered under the Act. Sect. 7 provides that a person shall not be registered as having been at the passing of the Act engaged in the practice of dentistry, unless, before August 1, 1879, he makes a declaration in the form in the schedule to the Act, or to the like effect. The form contains the words, "I was bonâ fide engaged in the practice of dentistry at the date of the passing of the Act." By s. 37 an articled pupil, with certain qualifications, whose articles expire before January 1, 1880, is entitled to be registered as though he had been in bonâ fide practice before the passing of the Act.

The prosecutor applied for a mandamus commanding the General Council to place his name on the Dentists' Register. He had not made the declaration required by s. 7, but was in other respects qualified under s. 37:—

Held, that the proviso in s. 7 applies to persons whose qualification is given by s. 37, and therefore the prosecutor, not having made the declaration, was not entitled to be registered.

An order nisi had been obtained calling upon the General Council of Medical Education and Registration of the United Kingdom to shew cause why a writ of mandamus should not issue, commanding them to place upon the Dentists' Register the name of the prosecutor, Isidore Spero.

At the date of the passing of the Dentists Act, 1878 (1), July 22, 1878, the prosecutor was articled as a pupil to a dental practitioner, who was entitled to be registered under the Act. The prosecutor had paid to the practitioner to whom he was articled a premium of 30*l.*, in consideration of receiving from such practitioner a complete dental education. The articles were for a period of three and a half years, commencing on

(1) 41 & 42 Vict. c. 33. The material provisions of the Act are set out in the judgment of Hawkins J.

April 13, 1875, and expiring on October 13, 1878. The prosecutor did not produce or transmit to the registrar, before August 1, 1879, the declaration required by s. 7 of the Dentists Act, 1878, and he did not apply to be registered until several years later. The General Council refused to place his name on the register, and the order nisi for a writ of mandamus was moved for, on the ground that, by the first part of s. 37, the prosecutor was entitled, as of right, to be registered under the Act.

Muir Mackenzie, for the General Council, shewed cause. The prosecutor is not entitled to be registered, for s. 37 of the Dentists Act, 1878, only entitles a person in his position, that is a person who has been articled as a pupil, and whose articles have expired before January 1, 1880, to be registered as though he had been in bonâ fide practice before the passing of the Act. A person who was in bonâ fide practice before the Act is entitled to be registered under s. 6, sub-s. (*c*), but subject to the proviso in s. 7, that he must have made the declaration mentioned in that section before August 1, 1879. The prosecutor has not made this declaration. No doubt the exact words in the form of declaration in the schedule to the Act are inapplicable to the case of an articled pupil; but s. 7 contains the words "or to the like effect." It is unreasonable to suppose that the Legislature intended to place articled pupils in a more favourable position than persons in bonâ fide practice, by exempting the former class from a condition imposed on the latter.

T. Willes Chitty, for the prosecution. The prosecutor is entitled to be registered, because he comes within the exact words of the first part of s. 37, and that section has not the effect of applying to his case the proviso contained in s. 7. That proviso applies only to persons qualified under s. 6, sub-s. (*c*). The form in the schedule is wholly inapplicable to persons qualified under s. 37. If the argument on behalf of the General Council is to prevail, and the prescribed form of declaration is to be altered, so as to apply to the case of persons qualified under s. 37, a difficulty will arise in the case of persons whose articles expired on or after August 1, 1879, and before January 1,

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1880, for it is difficult to see how such persons could have been in a position to make the prescribed declaration before August 1, 1879.

HAWKINS J. I am of opinion that the order nisi ought to be discharged. The Dentists Act, 1878 (41 & 42 Vict. c. 33), provides by s. 6 that "Any person who . . . . (*c*) is at the passing of this Act bonâ fide engaged in the practice of dentistry or dental surgery, either separately or in conjunction with the practice of medicine, surgery, or pharmacy, shall be entitled to be registered under this Act." The Act was passed on July 22, 1878, and at that date the prosecutor, Mr. Spero, was not "engaged in the practice of dentistry or dental surgery," and therefore was not entitled to be registered under s. 6, sub-s. (*c*). But the Act further provides that certain other persons are entitled to be registered, under certain restrictions. By s. 37, "Any person who has been articled as a pupil, and has paid a premium to a dental practitioner entitled to be registered under this Act, in consideration of receiving from such practitioner a complete dental education, shall, if his articles expire before 1st January, 1880, be entitled to be registered under this Act as though he had been in bonâ fide practice before the passing of this Act." The prosecutor, Mr. Spero, was articled as a pupil, and had paid a premium to a dental practitioner entitled to be registered under the Act; he had paid such premium in consideration of receiving a complete dental education, and his articles expired before January 1, 1880. It is contended on his behalf that he is entitled to be registered under the Act. Now the object of the Act is to put persons who are in the position of the prosecutor in the same position as if they had been in practice at the date of the passing of the Act. It becomes necessary therefore to ascertain what would entitle a practitioner, who had been in actual practice at the date of the passing of the Act, now to be registered under the Act. This is shewn by the following clause in s. 7: "Provided that a person shall not be registered under this Act as having been at the passing thereof engaged in the practice of dentistry, unless he produces or transmits to the registrar, before 1st August, 1879, informa-

tion of his name and address, and a declaration signed by him in the form in the schedule to this Act, or to the like effect." I cannot see any reason why a person who comes within the terms of s. 37, and, therefore, is entitled to be registered as though he had been in bonâ fide practice before the passing of the Act, should not be in the same position, and subject to the same conditions, as a person who comes within s. 6, sub-s. (*c*), by having been at the passing of the Act bonâ fide engaged in practice. An argument on behalf of the prosecutor has been based on the form of the declaration in the schedule to the Act, and I agree that, if it were necessary to follow verbatim the form given in the schedule, there would be a difficulty in the way of any person whose qualification depends upon s. 37 making the required declaration, for the words in the schedule are, "I . . . . hereby declare that I was bonâ fide engaged in the practice of dentistry at ——, at the date of the passing of the Dentists Act, 1878." But the words of s. 7 are, "a declaration . . . . in the form in the schedule to this Act, or to the like effect," and I can see no reason why the words in the schedule should not be altered, so as to make the declaration applicable to the case of a person whose qualification is given by s. 37. I think that if this were done the registrar would be bound to accept the declaration so made, and to allow it to take effect in the same way as a declaration following the words given in the schedule. It follows that the prosecutor, not having made the declaration required by s. 7 within the time prescribed by that section, that is, before August 1, 1879, is not now entitled to be registered, and the order nisi for a mandamus must be discharged.

WRIGHT J. I am of the same opinion. On the whole, it seems to me that the natural meaning of the Act is, that persons who claim to be entitled to be registered under s. 37 must make the declaration required by s. 7, not in the precise words of the form in the schedule, but in a form to the like effect. This disposes of the present case; but I express no opinion as to the position of any persons whose articles may have expired at some time during the last five months of the

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year 1879, and who might find themselves unable to conform with the requirements of the Act.

Order discharged.

Solicitor for prosecutor: *Bertram Jacobs.*
Solicitors for defendants: *Farrer & Co.*

P. B. H.

C. A.
1897
May 5.

[IN THE COURT OF APPEAL.]

LONDON AND EASTERN COUNTIES LOAN AND DISCOUNT COMPANY *v.* CREASEY.

Bill of Sale—Specific Description—Plant—Substitution—Horse—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 6, *sub-s.* 2.

Horses used as cab-horses are not plant within the meaning of s. 6, sub-s. 2, of the Bills of Sale Act (1878) Amendment Act, 1882.
Yarmouth v. *France*, (1887) 19 Q. B. D. 647, distinguished.

APPEAL from the judgment of a Divisional Court (Wright and Bruce JJ.), dismissing an appeal from the judgment of a county court judge upon an interpleader issue.

The issue was whether two horses were the property of the London and Eastern Counties Loan and Discount Company as grantees of a bill of sale, or of Creasey as a purchaser of them from the grantor subsequently to the bill of sale.

The county court judge gave judgment for Creasy.

The facts are stated in the report of the case in the Court below. (1)

Lynden Bell, for the appellants. The horses in question, having been substituted for other horses used by the grantor of the bill of sale in his business as a cab-proprietor, which were specifically described in the bill of sale, came within the provisions of s. 6, sub-s. 2, of the Bills of Sale Act, 1882, and the bill of sale is not void in respect of them, although they were not specifically described in it. They came within the sub-section as being "plant used in or brought upon" the

(1) Ante, p. 442.

grantor's premises in substitution for the like plant within the meaning of the sub-section. No doubt their main use would not be on the premises, but in the streets; but they would be used on the premises to some extent. They would be harnessed on the premises and draw the cabs out of them. Horses have been held to be plant in *Yarmouth* v. *France*. (1)

Clavell Salter, for the respondent. These horses were not the kind of plant contemplated by s. 6, sub-s. 2, of the Bills of Sale Act, 1882. Plant is spoken of by the sub-section in connection with fixtures and trade machinery. It is not contended that the sub-section is confined to inanimate things, but that it contemplates "plant," the user of which, as in the case of fixtures and trade machinery, has reference to a definite locality—some particular piece of land, manufactory, or premises. The decision in *Yarmouth* v. *France* (1) was upon the Employers' Liability Act, in which the word "plant" is used in connection with words wholly different from those of the Bills of Sale Act, 1882. That case is therefore no authority for the present case.

Lynden Bell, in reply.

LORD ESHER M.R. The question is not whether these horses could properly be called plant used in a business, but whether they are such plant as is described in s. 6, sub-s. 2, of the Bills of Sale Act, 1882. That enactment does not speak of plant used in a business, but plant "used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for" plant specifically described in the schedule to a bill of sale. The words "other place" cannot mean any other place in the world, but must refer to other places of a description similar to those previously mentioned. The place here in question must be the premises on which the grantor carried on business. Assuming that these horses might be said to be plant used by the grantor of the bill of sale in his business, the question is whether they come within the words of the sub-section as being "used in, attached to, or brought upon" his premises. They clearly

(1) 19 Q. B. D. 647.

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Lord Esher M.R.

were not attached to the premises, and I do not think that they were brought upon the premises in the sense intended by the sub-section. I do not think a temporary bringing upon the premises will suffice. The real question is whether they can be said to have been "used on" the premises. It appears to me that they cannot, for the use of them for the purpose of the grantor's business was not on the premises, but in cabs plying for hire in the streets. Therefore, although they might in one sense be said to be plant, they were not such plant as could be substituted for the like plant specifically described in the schedule to the bill of sale within the meaning of the sub-section. I therefore think that the judgment of the Divisional Court was correct, and should be affirmed.

A. L. SMITH L.J. I am of the same opinion. The question depends upon the meaning of the word "plant" as used in s. 6, sub-s. 2, of the Bills of Sale Act, 1882, and not upon its meaning as used in the Employers' Liability Act, under which the case of *Yarmouth* v. *France* (1) was decided. In the sub-section which we have to construe, the word "plant" is inserted between the words "fixtures" and "trade machinery," and the enactment applies to cases "where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale." I think that the Legislature were dealing with what are ordinarily termed fixtures, plant, and trade machinery, and that it would be beyond all reason to hold that the term "plant" in the sub-section applies to cab-horses which have been substituted for other cab-horses used in the business of a cab-proprietor.

CHITTY L.J. In *Yarmouth* v. *France* (1) it was decided that a horse might be plant within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act, 1880, the words there used being "plant connected with or used in the business of the

(1) 19 Q. B. D. 647.

employer." In the enactment which in this case we have to construe, the Legislature has not used the same words, nor have they used words which, according to any fair mode of construction, can be considered as their equivalent. Sect. 6, sub-s. 2, of the Bills of Sale Act, 1882, speaks not of plant used in a business, but of "fixtures, plant, or trade machinery used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place." The "plant" contemplated by the sub-section appears to be plant in reference to some specific locality, such as a farm, factory, or workshop, for the word "other place" must be construed in connection with the preceding words. The horses in question were cab-horses. Their use was not in the stable of the cab-proprietor, nor were they attached to the stable in the sense intended by the sub-section. Their use was out in the streets. Again, the words "brought upon" must be construed with reference to the previous words. The substance of the expressions used appears to me to be that, in order to come within the sub-section, "plant," which I do not deny may include living animals, must be used on the premises themselves. A horse that turns a mill for grinding chalk or the like might, I think, be "plant" within the sub-section. But that case would be quite different from the present, for there the horse would be used in the factory or other place where the mill was. For these reasons I think that the judgment of the Divisional Court was right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *Roland H. Ward.*
Solicitor for respondent: *Alfred Slater.*

E. L.

1897
May 6.

DERBYSHIRE, APPELLANT *v.* HOULISTON, RESPONDENT.

Adulteration—Scienter—Giving False Warranty to Purchaser—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 27.

The appellant was charged, under s. 27 of the Sale of Food and Drugs Act, 1875, with giving a false warranty in writing to a purchaser in respect of an article of food sold by the appellant. When the appellant sold the article he did not know, and had no reason to believe, that the warranty was false :—

Held, that he was not liable to be convicted.

CASE stated by the stipendiary magistrate for the city of Manchester.

The appellant was summoned under s. 27 of the Sale of Food and Drugs Act, 1875 (1), by the respondent, an inspector of nuisances, for that the appellant, on September 8, 1896, did give a false warranty in writing to a purchaser, one Hopkins, in respect of an article of food, to wit, butter, then sold by the appellant to Hopkins, and subsequently, on September 16, 1896, sold by Hopkins to the respondent, the said article not being of the nature, substance, and quality of the article demanded by the respondent.

The facts of the case were as follows :—

The respondent, on September, 16, 1896, went to the shop of

(1) 38 & 39 Vict. c. 63. By s. 27, "Any person who shall forge, or shall utter, knowing it to be forged for the purposes of this Act, any certificate or any writing purporting to contain a warranty, shall be guilty of a misdemeanour, and be punishable on conviction by imprisonment for a term of not exceeding two years with hard labour ;

"Every person who shall wilfully apply to an article of food, or a drug, in any proceedings under this Act, a certificate or warranty given in relation to any other article or drug, shall be guilty of an offence under this Act, and be liable to a penalty not exceeding 20*l.* ;

"Every person who shall give a false warranty in writing to any purchaser in respect of an article of food or a drug sold by him as principal or agent, shall be guilty of an offence under this Act, and be liable to a penalty not exceeding 20*l.* ;

"And every person who shall wilfully give a label with any article sold by him which shall falsely describe the article sold, shall be guilty of an offence under this Act, and be liable to a penalty not exceeding 20*l.*"

Hopkins, a retail grocer. On the counter in the shop was a quantity of butter marked "Pure Butter, 10*d*.," and the respondent, pointing to this butter, asked for a pound thereof, and was supplied therewith by an assistant in the employment of Hopkins.

The respondent gave the notification, and divided into three parts the butter purchased, in manner required by s. 14 of the Act, and sealed up such parts; one of such parts was delivered to Hopkins, and another was retained by the respondent, and the third was submitted, as directed by the Act, to the public analyst, who duly gave his certificate, and upon the hearing proved that the butter in question was adulterated, containing 23 per cent. of water.

Hopkins had, on September 8, 1896, purchased the butter in question from the appellant, as the same in nature, substance, and quality as that demanded of him by the respondent, and with a written warranty to that effect. Hopkins had no reason to believe at the time when he sold it that the article was otherwise, and he sold it in the same state as when he purchased it.

A summons was taken out against Hopkins, but was dismissed, upon his giving proof of the matters stated in the preceding paragraph.

The appellant purchased the butter in question, on August 22, 1896, from one Maloney, as the same in nature, substance, and quality as that so sold by the appellant to Hopkins, and with a written warranty to that effect, and the appellant had no reason to believe at the time when he sold it to Hopkins that the article was otherwise, and the appellant sold it in the same state as when he purchased it.

It was contended for the appellant: (1.) That it was necessary to prove that the appellant, at the time when he gave to Hopkins the warranty dated September 8, 1896, knew that it was false.

(2.) That on the facts above stated the appellant was entitled to be discharged from the prosecution by virtue of the provisions of s. 25 of the Act.

It was contended on behalf of the respondent: (1.) That it

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was not necessary to prove that the appellant, at the time when he gave the warranty to Hopkins, knew that it was false.

(2.) That on the facts above stated the appellant was not entitled to the protection afforded by s. 25 of the Act.

The magistrate was of opinion that the contentions of the respondent were correct in law, and convicted the appellant.

The questions for the opinion of the Court were :—

(1.) Whether it was necessary to prove guilty knowledge on the part of the appellant in giving the warranty to Hopkins.

(2.) Whether the appellant, upon the facts above stated, was entitled to be discharged from the prosecution by virtue of s. 25 of the Act.

C. A. Russell, Q.C. (*F. H. Mellor* with him), for the appellant. If it is not necessary in proceedings under the 3rd clause of s. 27 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), to prove guilty knowledge on the part of the person charged, still, on the facts stated in the case, the appellant is entitled to be discharged under s. 25. The true construction, however, is that, in all proceedings under s. 27, guilty knowledge is an essential part of the offence. It is clear that, in all proceedings under the 1st, 2nd, and 4th clauses of s. 27, proof of guilty knowledge is required, and it is unreasonable to suppose that it was intended to make an exception in the case of proceedings under the 3rd clause. It is true that in proceedings under s. 6 proof of scienter is not required : *Betts* v. *Armstead* (1) ; and the same is the case in proceedings under s. 9 : *Pain* v. *Boughtwood* (2) ; *Dyke* v. *Gower* (3) ; but the wording of those sections, and the offences with which they deal, shew that such cases are different from cases under s. 27.

Lawson Walton, Q.C. (*Reginald Brown* with him), for the respondent. Sect. 25 does not apply. In proceedings under s. 27 it is not essential to shew that the seller, when he sold the article, knew that the warranty he gave was false. This is shewn by the decisions already referred to on the other sections of the same Act, and also by *Spiers & Pond* v. *Bennett*. (4)

(1) (1888) 20 Q. B. D. 771.
(2) (1890) 24 Q. B. D. 353.
(3) [1892] 1 Q. B. 220.
(4) [1896] 2 Q. B. 65.

[WRIGHT J. referred to *Starey* v. *Chilworth Gunpowder Co.* (1); HAWKINS J. referred to *Reg.* v. *Prince.* (2)]

The other clauses of s. 27 contain the word "knowing," or the word "wilfully": the omission of any such expression from the 3rd clause of the section must have been intentional.

[HAWKINS J. In Comyn's Digest "False Warranty" comes under "Action upon the Case for a Deceipt" A (11.).]

The word "false" in s. 27 means no more than "untrue"; had it been otherwise, the word "knowingly" would have been inserted. The section was passed for the protection of the public, and should be so construed as to carry out the intention of the Legislature.

C. A. Russell, Q.C., was not heard in reply.

HAWKINS J. The sole question for our consideration is, whether, on the facts stated in the case, the appellant was rightly convicted, under s. 27 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), of giving a false warranty in writing to a purchaser in respect of an article of food sold by him, the appellant. I am of opinion that he was not rightly so convicted. I am not going to discuss the provisions of s. 25 of the Act, for the question which has to be determined is, what is the meaning of s. 27? The offence with which the appellant is charged under that section is, giving a false warranty in writing to a purchaser in respect of an article of food sold by him. It is quite clear to my mind that, in order to convict a person of such an offence, proof of scienter is necessary. Sect. 27 deals with four separate and distinct offences. The 1st clause of the section makes it an offence to forge, or utter, knowing it to be forged for the purposes of the Act, any certificate or any writing purporting to contain a warranty; it is quite clear that scienter must exist where a document is forged, and therefore knowledge must be essential to a conviction under this clause. Then by the 2nd clause it is an offence wilfully to apply to an article of food, or a drug, in any proceedings under the Act, a certificate or warranty given in relation to any other article or drug: here again a guilty knowledge is

(1) (1889) 24 Q. B. D. 90. (2) (1875) L. R. 2 C. C. 154.

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clearly necessary. By the 4th clause of the section, "every person who shall wilfully give a label with any article sold by him which shall falsely describe the article sold" is guilty of an offence. It is quite obvious that under this clause a man cannot be convicted without knowingly giving a false label, for the words mean that he wilfully gives with the article sold a label which he knows to be false. Therefore we find the 3rd clause of the section, under which the question in the present case arises, associated with these other three clauses, under all of which a guilty knowledge is clearly necessary. This brings us back to the question, what is the true construction of the 3rd clause? Does it mean that a man is to be convicted if he gives a warranty, which turns out to be false in fact, but which, when he gives it, he honestly believes to be true, having reasonable ground for so believing, or is it intended to punish a man who knowingly gives a false warranty? It seems to me to be a monstrous proposition that a man can be convicted and be liable to a penalty of 20*l.* in such a case as this, even though he believed that the warranty which he gave was true. No doubt there are cases (as for instance under the Acts relating to explosive substances (1)) where proof of guilty knowledge is not made necessary, although the statute is dealing with a criminal offence; but there is nothing to indicate any such intention here. Where it is sought to be shewn that the Legislature means to punish without requiring proof of moral guilt, such an intention must be very clearly expressed. In the present case, where the charge is under one of four clauses contained in the same section, and all the other three clauses clearly require proof of guilty knowledge, I am of opinion that the conviction cannot be supported in the absence of such proof.

WRIGHT J. I am of the same opinion. The general rule is that a presumption exists that mens rea is essential to every criminal offence. There are instances in which it has been held that this presumption is displaced by the words of the statute creating the offence, but where this is the case the

(1) See 46 & 47 Vict. c. 3, s. 4.

intention must be clearly expressed. In *Sherras* v. *De Rutzen* (1) I pointed out a number of instances in which it had been held that the presumption had been so displaced. In the case of the statute now before us, it has been decided by the cases which were cited in argument that, in proceedings under s. 6 or s. 9, it is not necessary that there should be proof that the person accused acted with a guilty mind; but I am of opinion that this is not the case in proceedings under s. 27. In the case of all the other offences created by that section, the language used requires proof of the existence of a guilty mind. This is clear in the case of proceedings for forgery under the 1st clause, and equally so in proceedings under the 2nd and 4th clauses, for wilfully applying to an article a warranty relating to another article, and for wilfully giving a label with the article sold falsely describing such article. Then there remains the case now before us, that of giving a false warranty in writing, which comes under the 3rd clause. In providing for that offence the Legislature were dealing with a criminal matter, and the same presumption would naturally apply as applies to all the other clauses of the section. The use of the expression "give a false warranty" implies the existence of a guilty mind, and therefore, if we construe s. 7 according to the ordinary rules of construction, it is plain that the conviction in the present case cannot stand.

Judgment for appellant.

Solicitors for appellant: *Crowders & Vizard, for Hockin, Raby & Beckton, Manchester.*

Solicitors for respondent: *Austin & Austin, for Thomas Hudson, Manchester.*

(1) [1895] 1 Q. B. 918.

P. B. H.

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April 7.

J. & P. COATS, LIMITED *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Conveyance on Sale—Exchange of Shares—Ad valorem Stamp—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 55, 73.

By an instrument entered into in pursuance of an agreement, a shareholder in one company transferred his shares to another company in exchange for certain shares in the latter company :—

Held, that the transaction was a conveyance on sale of the shares under ss. 54 and 55 of the Stamp Act, 1891, and that the instrument was therefore chargeable with an ad valorem stamp.

CASE stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891.

J. & P. Coats, Limited, is a company incorporated under the Companies Acts on August 6, 1890, for the purpose of carrying on in the United Kingdom a business including the manufacture of cotton, woollen, and other threads. James Chadwick & Brother, Limited, is a company incorporated under the same Acts on November 27, 1891, for the purpose of carrying on in the United Kingdom a business of a precisely similar character.

By an agreement dated July 2, 1896, and made between James Chadwick & Brother, Limited, of the first part, certain shareholders and directors of James Chadwick & Brother, Limited, of the second part, the managing directors and officials of James Chadwick & Brother, Limited, of the third part, and J. & P. Coats, Limited, of the fourth part, it was agreed that the parties of the second part "shall use their best endeavours to procure all the holders of ordinary and preference shares of James Chadwick & Brother, Limited, to sell and dispose of these shares to J. & P. Coats, Limited, in exchange for fully paid-up preference and ordinary shares of J. & P. Coats, Limited, in the ratio of one ordinary share of J. & P. Coats, Limited, for three ordinary shares of James Chadwick & Brother, Limited, and four preference shares of J. & P. Coats, Limited, for five preference shares of James Chadwick & Brother, Limited, and

if the holders of all the ordinary shares of James Chadwick & Brother, Limited, and the holders of at least 13,000 of the preference shares of James Chadwick & Brother, Limited, shall agree to such sale or exchange, the same shall be carried out accordingly by the allotment by J. & P. Coats, Limited, to the holders of the said ordinary and preference shares of James Chadwick & Brother, Limited, respectively, of fully paid-up ordinary and preference shares of J. & P. Coats, Limited, in the ratio aforesaid." At an extraordinary general meeting of the shareholders in James Chadwick & Brother, Limited, duly held on July 20, 1896, the foregoing agreement was approved, and the following resolution was passed:—

"That it is desirable in the interest of the shareholders in this company that the amalgamation should be carried into effect by an exchange of the preference and ordinary shares of this company for fully paid preference and ordinary shares of J. & P. Coats, Limited, in the ratio mentioned in the said agreement, . . . and that the directors be requested to take any steps which they may think necessary for carrying out the agreement in that way."

In order to carry out the agreement in the manner declared to be desirable by that resolution, a memorandum in the following form was prepared for signature by the shareholders in James Chadwick & Brother, Limited:—

"The undersigned hereby agree with J. & P. Coats, Limited, to transfer to them all the preference $\frac{\text{and}}{\text{or}}$ ordinary shares in James Chadwick & Brother, Limited, held by the undersigned alone or jointly with others, with all dividends thereon as from July 1, 1896, in exchange for fully paid preference $\frac{\text{and}}{\text{or}}$ ordinary shares of J. & P. Coats, Limited, carrying dividend as from the same day in the ratio following, namely, one ordinary share of J. & P. Coats, Limited, for three ordinary shares of James Chadwick & Brother, Limited, and four preference shares of J. & P. Coats, Limited, for five preference shares of James Chadwick & Brother, Limited. The undersigned will execute at the expense of J. & P. Coats, Limited, any further or better assurance which they may reasonably require, and will at the like expense sign all proxies, receipts, and other documents

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which may be necessary to give to J. & P. Coats, Limited, the full benefit of the shares hereby agreed to be transferred, until the same shall have been actually vested in them."

A memorandum in this form was signed by one Alfred Kaye, the proprietor of twenty-five ordinary shares in James Chadwick & Brother, Limited, and at the foot of it there was an acceptance by J. & P. Coats, Limited, in the following form: "For and on behalf of J. & P. Coats, Limited, I agree to the above. James Adam, Secretary."

In pursuance of this memorandum, Alfred Kaye on August 26, 1896, executed the following instrument:—

"I, Alfred Kaye, of Edgerton Bank, Edgerton, Huddersfield, in exchange for eight fully paid ordinary shares of J. & P. Coats, Limited, allotted to me by them, and one fractional ordinary certificate delivered to me, do hereby transfer to the said J. & P. Coats, Limited, twenty-five ordinary shares of 10*l.* each, numbered 42,612 to 42,636, inclusive, of and in the undertaking called James Chadwick & Brother, Limited, to hold unto the said J. & P. Coats, Limited, subject to the several conditions on which I held the same immediately before the execution hereof: And we, the said J. & P. Coats, Limited, do hereby agree to accept and take the said shares subject to the conditions aforesaid." This instrument was duly executed by Alfred Kaye and by J. & P. Coats, Limited.

The question arose as to the stamp duty with which this instrument was chargeable.

The commissioners were of opinion that it was a transfer made upon a sale, and must be charged under the head "Conveyance or Transfer on Sale" in the first schedule to the Stamp Act of 1891 with an ad valorem duty; and having been certified that the value of the eight ordinary shares and the fractional certificate in J. & P. Coats, Limited, so transferred, was on August 26, 1896, 529*l.* 3*s.* 4*d.*, they assessed upon the instrument the duty of 2*l.* 15*s.*, being the ad valorem duty of 5*s.* for every 50*l.* of that sum.

J. & P. Coats, Limited, being dissatisfied with the assessment, obtained this case for the opinion of the Court.

By s. 6 of the Stamp Act, 1891, "Where an instrument is

chargeable with ad valorem duty in respect of . . . . any stock or marketable security, the duty shall be calculated on the value on the day of the date of the instrument . . . . of the stock or security according to the average price thereof."

By s. 54, "For the purposes of this Act the expression 'conveyance on sale' includes every instrument and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

By s. 55, "(1.) Where the consideration or any part of the consideration for a conveyance on sale consists of any stock or marketable security, the conveyance is to be charged with ad valorem duty in respect of the value of the stock or security."

By s. 73, "Where upon the exchange of any real or heritable property for any other real or heritable property, or upon the partition or division of any real or heritable property, any consideration exceeding in amount or value one hundred pounds is paid or given, or agreed to be paid or given, for equality, the principal or only instrument whereby the exchange or partition or division is effected is to be charged with the same ad valorem duty as a conveyance on sale for the consideration, and with that duty only. . . . ."

By s. 122, "The expression 'stock' includes any share . . . . in the capital stock . . . . of any company . . . . in the United Kingdom."

The schedule to the Act contains the following items: –

"*Conveyance or Transfer on Sale*—

"Of any property where the amount or value of the consideration for the sale exceeds 300*l.* . . . .

"For every 50*l.*, and also for any fractional part of 50*l.* of such amount or value . . . . 5 shillings.

"*Exchange or Excambion*—Instruments effecting.

"In the case specified in s. 73, see that section.

"In any other case . . . . 10 shillings."

Cozens-Hardy, Q.C. (*Theobald* with him), for J. & P. Coats, Limited. The commissioners were wrong. This transaction

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was not a conveyance on sale, but an exchange, and falls within the words of the schedule, "in any other case." The instrument was therefore only chargeable with a ten-shilling stamp.

The word "exchange" does not merely refer to real property. No definition of the word can be found in the Act; but in Shepherd's "Touchstone," p. 289, an exchange is defined as "the mutual grant of equal interests, ... the one in exchange for the other," which clearly refers to personalty as well as to realty.

The Attorney-General (*Sir R. E. Webster, Q.C.*), (*Danckwerts* with him), for the Crown. The commissioners were right. When the substance of the transaction is looked at it is plain that this was a conveyance or transfer on sale of certain shares in J. & P. Coats, Limited, for which the consideration was certain shares in James Chadwick & Brother, Limited. Sect. 55 of the Act plainly contemplates such a case.

The word "exchange" in the Stamp Acts only refers to real property, as is plain from s. 73, and from reference to the original Stamp Act (55 Geo. 3, c. 184). No stamp duty was then payable in respect of transactions in personal property.

The schedule to that Act contains the following:—

"*Exchange.* Any deed whereby any lands or other hereditaments or heritable subjects in England or Scotland shall be conveyed, or any copyhold or customary lands or hereditaments in England, shall be covenanted to be surrendered in exchange for other lands or hereditaments or heritable subjects."

That the term "exchange" was intended in the Stamp Act to apply only to realty is also shewn by the use of the word "excambion," which by Wharton's Law Lexicon is "a contract whereby one piece of land is exchanged for another," and is a term of Scottish law.

The point has really been decided by the Court of Appeal in *Great Western Ry. Co.* v. *Commissioners of Inland Revenue* (1) and *Foster* v. *Commissioners of Inland Revenue.* (2)

Cozens-Hardy, Q.C., replied.

WILLS J. I have come to the conclusion that the Crown is entitled to our judgment in this case. I do not say that the

(1) [1894] 1 Q. B. 507. (2) [1894] 1 Q. B. 516.

matter is free from doubt, for which the not very happy language of the draftsman is responsible. Sect. 54, which begins to describe the instrument as "conveyance on sale," goes on to say, "includes any instrument whereby any property upon the sale thereof is transferred," treating the sale thereof as the cardinal thing which is to determine whether it is to be treated as a "conveyance on sale" or not. Now, "sale" undoubtedly in our law generally imports the exchange of some commodity or some article of property for money, and it will be found so defined in Mr. Benjamin's book on Sale, and I think in Lord Blackburn's book also. That is obviously the general meaning of the word; and therefore, if that section stood alone and was not qualified by the subsequent section, it would be necessary to see whether the transaction in question was a sale for money. But then there comes s. 55, which says (I omit words which are immaterial and do not help one for this purpose): "Where the consideration for a conveyance on sale consists of any stock," and by the definition that includes any shares, "the conveyance is to be charged with the ad valorem duty in respect of the value of the stock or security." That is a clear indication that there may be, within the meaning of these sections, a conveyance on sale where the transaction is not properly a sale in the ordinary understanding of the word, because it is not for money; and therefore I think (and the Court of Appeal in the case of *Foster* v. *Commissioners of Inland Revenue* (1) thought so too) that the effect of s. 55 is to put a transaction, where the consideration is stock or shares, on exactly the same footing as if it was money itself. I think that is undeniably the effect of the judgment in that case. Now, if that is so, it settles the question, because, although not strictly speaking a sale, it is turned for the purposes of the Stamp Act into the equivalent of a transaction where money itself has been paid as a consideration, and that seems to me to dispose of the whole question. Primâ facie, no doubt the transaction was an exchange of one class of stock for another; but then I think if these two sections are taken together and read in the view that has been taken of them

(1) [1894] 1 Q. B. 516.

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in the Court of Appeal, it is impossible to help saying that such a transaction must, for the purposes of the Stamp Act, be treated as if it was a conveyance on sale, though it may not properly be so.

But it is said that this is a case of "exchange" under the schedule to the Act. It cannot, however, for the purposes of the Stamp Act be both an exchange and a conveyance on sale; and inasmuch as s. 54 and 55, taken along with the judgment of the Court of Appeal, shew clearly that where the consideration is shares the transaction must be treated as a conveyance on sale, therefore it cannot fall within the word "exchange." I do not wish to discuss or to attempt to decide the question of whether exchange is limited to real property. It does not seem necessary to decide that. But certainly, looking at the history of the matter as disclosed to us in the Act of 55 Geo. 3 and subsequent Acts, there is considerable ground for arguing that "exchange" really was intended to apply to real property and not to go beyond it. The term "excambion" seems to be a term known to Scottish law, and it appears there to be applied to heritable property and to heritable property only. Of course, etymologically, it means nothing more than exchange; but it may very well be that in the law of Scotland it has got a definite meaning; I cannot, however, for a moment imagine that it was introduced into the Stamp Act for any other purpose than to hit Scottish instruments which went by such a name, because long before the Act of 55 Geo. 3 "excambion," whatever it might have been at the time when Shepherd's "Touchstone" was written, had ceased to be a term of English law, or known to English law except as a matter of antiquarian history.

GRANTHAM J. I am of the same opinion. I think if we look at this document from the beginning to the end of it we shall find that the intention of the parties was that this should be a sale or transfer of shares in James Chadwick & Brother, Limited, to J. & P. Coats, Limited, and that it cannot in any way be brought under the 73rd section which deals with "exchange," or even under the words in the schedule to the

Act in which the words are used "or in any other case." I turn to the first paragraph of the agreement, and I find there that what the parties agreed to do was that the parties of the second part "shall use their best endeavours to procure all the holders of ordinary and preference shares of James Chadwick & Brother, Limited, to sell and dispose of their shares to J. & P. Coats, Limited." The words are "sell and dispose" of them. There could not be stronger words than those. It was to be a sale and disposition of property, not for money, but "in exchange for fully paid-up preference and ordinary shares of J. & P. Coats, Limited." But it was a sale out and out. Instead of taking money for these shares the shareholders were to take the shares of J. & P. Coats, Limited, and that is what they agreed to do.

At the general meeting of the shareholders on July 20, 1896, it was resolved that the agreement was a good one for the shareholders, and that therefore all the shareholders were advised to sell their shares in this way, and a memorandum was agreed upon, which all persons who could be persuaded to sign as members of James Chadwick & Brother, Limited, were requested to sign as shewing their approval. Now what is the language of this memorandum? It is this: "The undersigned hereby agrees with J. & P. Coats, Limited, to transfer to them all the preference and ordinary shares in James Chadwick & Brother, Limited, held by the undersigned." There you get the very word which is used in the Act, "transfer." Therefore it seems to me clear that this case comes within ss. 54 and 55 of the Act. The 55th section is, I think, sufficient to meet it, quite apart from the cases that have been quoted, but those cases very strongly support the view that we take, especially the language used by Lord Esher M.R. in *Great Western Ry. Co.* v. *Commissioners of Inland Revenue.* (1)

A very ingenious effort has been made by Mr. Cozens-Hardy to bring this transaction within the schedule, although he could not bring it within the section; but he quite failed to convince me that a transaction of this kind can be considered an exchange, where the parties practically sell one set of shares for another

(1) [1894] 1 Q. B. 507.

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and avoid paying the duty which would be properly payable under a transfer of shares.

Judgment for the Crown.

Solicitors for J. & P. Coats, Limited: *Linklater & Co.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

A. P. P. K.

1897
April 7.

THE MERSEY DOCKS AND HARBOUR BOARD *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamps—Security for Payment of Annuity—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 60, 87 *sub-s.* 2.

Sect. 87, sub-s. 2, of the Stamp Act, 1891, which provides for the stamping of a security for the payment of any annuity "by way of repayment or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged," applies to the case of terminable annuities, and does not apply to the grant of a perpetual annuity in consideration of a sum of money paid by way of purchase.

CASE stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891.

By the Mersey Dock Acts Consolidation Act, 1858, certain powers of borrowing at interest on the security of the rates were given to the appellants, the Mersey Docks and Harbour Board, and by s. 286, "All money borrowed by the board shall be secured either by bonds under their common seal or by annuities, and such bonds, with the coupons attached thereto, may be according to the form contained in the schedule, or in such other form as the board may from time to time deem expedient."

By s. 287, "And whereas it is expedient that the board should be enabled to grant annuities in consideration of money to be paid to them, and also in satisfaction for bonds and other securities granted . . . . by the board . . . . it shall be lawful for the board from time to time, if they shall think it expedient so to do, to grant to any person who shall pay to them any sum of money an annuity of such amount as shall be agreed upon

between such person and the board at a rate of not exceeding the amount of 5*l.* by the year for every principal sum of 100*l.*, and such annuities when so granted shall be called 'Mersey Dock Annuities.'"

By s. 288, "The board may at any time, if they shall think it expedient so to do, instead of requiring money to be actually paid to them, accept from any person desirous of obtaining a grant of a Mersey dock annuity a surrender of bonds or other securities granted . . . . by the board . . . . and every bond or other security so accepted by the board for such purpose as aforesaid shall be forthwith cancelled, and the principal money thereby expressed to be secured shall, for the purpose of determining as well the amount of the annuity that shall be granted to such person as the amount of stamp duty payable on such grant, be considered as so much money paid by him to the board."

By s. 290, "The board may accept a surrender of such bonds or other securities as aforesaid to any amount which they may deem expedient; but they are hereby expressly prohibited from accepting any greater sum of money in cash for the purchase of such annuities than they might at such time have legally borrowed upon the security of these bonds."

By s. 292, "Whenever the board shall grant a Mersey Dock annuity to any person in consideration either of a money payment to be made to them or of a surrender of such bonds or other securities as aforesaid, they shall cause an entry to be made in a book to be kept for that purpose to be called the "Register of Grants of Mersey Dock Annuities," and such entry shall contain not only a reference to the deed of grant of the annuity, but also in a tabular form the name and address of the grantee, the amount of money paid by him, or as the case may be, the particulars as to the number, date, and amount of each of the bonds or other securities surrendered, the date of payment, or as the case may be, the date of the surrender of the said bonds or other securities, the amount of annuity granted, the rate per cent. at which the same shall have been calculated, and the time mentioned in the deed of grant as the time for the

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commencement of such annuity; and every such entry shall be certified by the signatures of the chairman of the board and also of their treasurer; whereupon and not until then an annuity to the amount so specified as aforesaid shall vest in the person named in the deed of grant, and also in such entry, as the grantee thereof, as from the date at which such money, bonds, or other securities shall be so stated in the said book to have been paid or surrendered; but the deed of grant shall be retained by the board."

By s. 294, "Immediately after the completion of the grant of any such annuity the board shall at their own expense deliver a certificate thereof to the grantee, and such certificate shall have the common seal of the board attached thereto, and shall specify the amount of such annuity, and may be according to the form in the schedule hereunto annexed or to the like effect; and such certificate shall be admitted in all courts as primâ facie evidence of the title of such grantee, his executors, administrators, and assigns, to the annuity therein mentioned."

It was admitted that no stamp duty was paid upon the certificates granted to annuitants under this section.

By s. 304, "Every bond or grant of Mersey Dock annuities which may hereafter be granted or made by the board, and every transfer thereof respectively, and the transfer of every bond, mortgage, or other security already granted . . . . by the board shall . . . . be by deed duly stamped, wherein the consideration for the same shall be fully and truly stated."

By s. 308, "If at any time there shall not be any bonds or other securities granted by the board or for the payment whereof they may be liable, and if there shall not be any annuitant willing to sell to the board the amount of the Mersey Dock annuity held by him, it shall in such case, but in such case only, be lawful for the board to redeem so much of the Mersey Dock annuities as the amount of the surplus . . . . may permit, at a rate equal to the average market price of such annuities during the six months immediately preceding."

By s. 310, "The board shall not without the consent of the annuitant redeem his annuity until they shall have given to such annuitant six months' notice at least in writing of their

intention so to do, nor shall they without consent, redeem a part only of the annuity held by such annuitant.

By s. 311, "Whenever the board shall have given notice to any annuitant of their intention to redeem his annuity, his annuity shall at the expiration of the time fixed for the redemption thereof mentioned in such notice, and on payment of the redemption money, absolutely cease and determine."

On February 12, 1896, the board entered into an indenture with certain persons therein described as the annuitants, the material parts of which are as follows:—

"Whereas the board are desirous, in exercise of the powers vested in them by the Act hereinafter mentioned, of borrowing the sum of £300 on the security of the annuity hereinafter mentioned, and the annuitants have agreed to advance and lend to the board such sum accordingly, to be satisfied by such annuity. Now this indenture witnesseth, that in consideration of the said sum of £300 paid to the board by the annuitants on or before the execution of these presents (the receipt whereof the board do hereby acknowledge), the board do hereby, pursuant to and in exercise of the powers vested in them by the Mersey Dock Acts Consolidation Act, 1858, covenant and grant with and to the annuitants that the board and their successors will pay to the annuitants an annuity or yearly sum of eight pounds five shillings, to commence on the 1st day of April, 1896, and to be paid by equal half-yearly payments on the 1st day of October and the 1st day of April in every year, the first half-yearly payment to be made on the 1st day of October next. And the annuitants do hereby agree to accept the said annuity or yearly payment in full satisfaction and discharge of the said sum of £300 advanced and lent as aforesaid: Provided always that the said annuity shall in all respects be subject to the provisions of the Mersey Dock Acts Consolidation Act, 1858, in relation to Mersey Dock annuities.

"In witness whereof the board have hereunto affixed their common seal."

A question arose as to the stamp which this indenture ought to bear. The board contended that it was issued by way of a security for the repayment of a loan, and ought to be stamped

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in accordance with s. 87, sub-s. 2, of the Stamp Act, 1891. The commissioners were of opinion that the contract between the board and the annuitants was a contract of sale and purchase, and that the instrument was accordingly chargeable as a grant on sale of an ordinary annuity under s. 60, and assessed the duty accordingly, but at the request of the board stated this case for the opinion of the Court.

It was admitted that the annuity granted by the instrument was payable for an indefinite period—that is to say, until purchase or extinguishment or redemption under the powers and obligations of the Act.

By the Stamp Act, 1891, s. 54, "For the purposes of this Act the expression 'conveyance on sale' includes every instrument . . . . whereby any property or any estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

By s. 60, "Where upon the sale of any annuity or other right not before in existence, such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale."

By s. 87, sub-s. 2, "A security for the payment of any rent-charge, annuity, or periodical payments by way of repayment or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid."

Joseph Walton, Q.C. (*Carver* with him), for the appellants. This instrument is not a conveyance on sale, but is merely a security for the repayment of a loan, and therefore falls under s. 87, sub-s. 2. The form of the instrument must be disregarded, as it is not a statutory form, but was drawn expressly to meet

this difficulty; but it is plain from the whole tenor of the Mersey Dock Act, 1858, that these annuities were only created to secure money borrowed by the board.

The Attorney-General (*Sir R. E. Webster*, Q.C.) (*Danckwerts* with him), for the Crown. The instrument is the sale of an annuity, and is within the words of s. 60. The annuity is sold out and out. The 300*l.* cannot be paid back to the annuitants. The only way in which the board can get rid of the annuity is by buying it up. The annual payment does not discharge any part of the 300*l.*

Sect. 87, sub-s. 2, does not apply to such annuities as this; it relates to those terminable annuities by which a sum borrowed is discharged by so many annual payments.

Carver, in reply. The 300*l.* is discharged by the payment in perpetuity of the annuity. No property is transferred to the annuitants by this instrument, and it cannot therefore be considered as a conveyance on sale.

WILLS J. I am of opinion that our judgment must be for the Crown. The case is not one free from difficulty; but we must look in the first place at the Mersey Docks Act, and see, if we can, what the nature of the transaction is by which these annuities are created.

Now of course the foundation of the argument for the appellants, without which there would probably never have been this appeal, is that the Act of Parliament uses the word "borrowing," that it gives borrowing powers, and in s. 286 it undoubtedly speaks of these annuities as if they represented money borrowed; but when we come to see the sections which follow, under which the annuities are created—I do not think it is necessary to go through them, because the language is uniform throughout they are treated as annuities granted in consideration of money paid, and in one section specifically, which it is worth while to read, namely, s. 290, these annuities which are spoken of as purchased are contrasted with the case of money borrowed upon bonds. Further on in the Act the deed by which they are to be granted is described as a "deed of grant," and what is still more to the purpose perhaps, with regard to the

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statutory form of certificate given in the schedule to the Act is that it certifies that so-and-so is "the proprietor" of an annuity. Now those words, "proprietor of an annuity," seem to indicate that the grantee has a property in the annuity, and that the annuity is treated as property. I have not thought it worth while to go into the specific language of the particular instrument, because, as Mr. Walton most fairly conceded, the language used by that particular instrument cannot alter the nature of the security, which is a statutory one, created under the powers of the Act of Parliament; it is only useful as a compendious statement upon this point of the case for the appellants with regard to the duty, because it undoubtedly was framed for the purpose of endeavouring to bring the security within the very language of s. 87, sub-s. 2, of the Stamp Act, 1891. Now if we come to look at the Stamp Act itself, we find there are two headings: "Conveyances on Sale," and "Mortgages, &c."; and amongst the sections which have reference to the conveyances, we find s. 54, which says that the conveyance on sale shall include every instrument whereby any property is transferred to, or vested in, a purchaser. Mr. Carver in his reply adroitly dropped the "vested in," which is quite as important a part of the section as "transferred to." And surely this deed does vest the annuity in the purchaser, in the person who pays the money, and makes him in the language of the certificate the "proprietor" thereof. If so, it comes directly within the words of s. 54. In one respect also it falls within s. 60, and for this purpose I must refer to the specific language of the instrument. It falls within s. 60 because it not only purports to be an actual grant of an annuity, but also to covenant that the annuity shall be paid, which would make it fall within the words of s. 60; and so far it seems to me to be made out that this instrument does fall directly within the language both of s. 54 and of s. 60. But then, if there was really an inconsistency between s. 87, sub-s. 2, and these earlier sections, ss. 54 and 60, we should have had to consider, of course, which should prevail; but is there really an inconsistency between them? It is quite clear that Parliament, in passing the Act, did not mean to create any inconsistency, and it is

our duty so to construe the Act as not to raise one if we can help it.

Now, the group of sections to which s. 87 belongs is headed "Mortgages, &c.," and it is impossible to discard from the consideration of an Act framed like this the headings of the various groups of sections which are comprised under the respective headings. Sect. 87 being one of the sections which falls under "Mortgages, &c.," a lower rate of duty is to be taken "in respect of the security for the payment of any annuity by way of repayment or in satisfaction and discharge of any loan intended to be so satisfied and discharged." And, verbally, there is a good deal to be said for the proposition that this instrument may be brought under language like that; but, seeing that the two groups of sections are to some extent inconsistent, I cannot help thinking that s. 87, sub-s. 2, really relates to the case of terminable annuities, of which there were so many in existence at the time of the earlier Stamp Acts.

A very large portion of the local indebtedness of this country could not at that time, any more than it can now, have been created except on the terms that the loans should be entirely discharged by annuities which were granted and which would come to an end generally, I think, in sixty years. It seems to me that that is the class of case to which the section is intended to apply—in which the payment of the annuity went to satisfy and discharge the principal of the loan, and therefore the security was a mortgage or something like a mortgage. I do not think the section was intended to apply to the case of a grant of an annuity in consideration of a sum of money paid by way of purchase. This loan never was to be repaid as a matter of obligation. The annuities created by the board are very much on the same footing as Consols, and except by exercising the power which may or may not be exercised by the board of buying up the annuity—not discharging it, but buying it up and extinguishing it in that way—it never can be discharged, and it never was intended that the 300*l.* should be repaid as paying off the loan. It seems to me, therefore, that when the substance of the matter is looked at it is not a case in which the payment of an annuity is meant to be a satisfaction

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and discharge in at all the same sense as the repayment of the principal by means of annual payments, each of which not only pays the current interest but repays part of the principal.

For these reasons, I am of opinion that the Crown is entitled to our judgment.

GRANTHAM J. I am of the same opinion, and I have very little to add to what has been said by my learned brother. I entirely indorse everything he has said. Terminable annuities were really introduced for the benefit of the State, and it seems to me that the section, repeating as it does the language of earlier Stamp Acts, was passed for the purpose of meeting what seemed to be a hardship, namely, that when money was borrowed by way of terminable annuities the instrument creating them should have to pay the same stamp duty as would be paid if the instrument had been a perpetual security in the shape of a conveyance or grant of the annuity. On reading the statute in that way it seems to me that the only difficulty that we have here has been removed. No doubt if s. 87 is taken by itself there is a great deal to be said for the argument of the learned counsel for the appellants; but when the whole Stamp Act is looked at and the sections are read in their proper order, it appeared that s. 54 and the subsequent sections are headed "Conveyances on Sale," and include annuities in terms. Sect. 60 distinctly refers, as I think, to such annuities as are granted here. Then, coming to the sections which follow s. 86, which, as my learned brother pointed out, are headed "Mortgages, &c," we find that there is a special provision inserted for the purpose of treating terminable annuities as ordinary mortgages, of which the principal sum is itself to be repaid. Reading it in that light, it seems to me that the interpretation that I put upon s. 87, sub-s. 2, is the correct one, namely, that it is not the satisfaction of the 300*l.* by paying 8*l.* 5*s.* per year for ever which was intended to be covered by this section, but it is the satisfaction of the whole loan by a certain payment which would pay it off in a certain number of years; it is purely for the "payment of any rent-charge or annuity or periodical payments, by way of redemption or in

satisfaction or discharge of any loan." It is not in discharge of the loan that the 8*l.* 5*s.* is paid per annum: it is the payment of interest in perpetuity upon this loan. That being so, s. 60 clearly covering these grants of annuities, sub-s. 2 of s. 87 does not in any way alter the effect of s. 60, but is really applicable to a different class of security than that which we have to deal with here.

Judgment for the Crown.

Solicitors for appellants: *Rowcliffes, Rawle & Co.*
Solicitors for the Crown: *The Solicitor of Inland Revenue.*

A. P. P. K.

END OF VOL. I.